

# Land Use Controls: Of Enterprise Zones, Takings, Plans and Growth Controls\*

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THIS HAS BEEN A RELATIVELY QUIET YEAR for land use, planning and zoning issues in the nation's legislatures and courts. The trend has been towards amplification and consolidation, except for a few matters with implications for land use: the Administration's relatively new enterprise zone proposals,<sup>1</sup> the *Community Communications Co., Inc. v. City of Boulder*<sup>2</sup> case, United States Corps of Engineers—Section 404 (Clean Water Act)<sup>3</sup> permitting authority in coastal areas, and the state court fall-out from the United States Supreme Court's *San Diego Gas & Electric Co. v. City of San Diego*<sup>4</sup> nondecision (taking and compensation issue). The balance of this article deals with relatively recent developments (through early 1982) in the courts and legislatures in plans as laws, growth management, development rights, zoning and moratoria, housing and open space, section 1983 actions with land use implications, and transportation-related land use issues. A catch-all section deals with random cases and statutes which do not easily fit into the above categories.<sup>5</sup> Finally, a "pertinent foreign de-

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\*Special thanks to research assistants Marjorie Au and Gail Tamashiro, second-year editors of the Law Review of the University of Hawaii School of Law.

1. 128 CONG. REC. S2945-56 (1982); President's Message to Congress on the Enterprise Zone Tax Act of 1982; Solomon & Solomon, *Enterprise Zones, Tax Incentives and the Revitalization of Inner Cities*, 1981 DET. C.L. REV. 797 (1981).

2. \_\_\_\_\_ U.S. \_\_\_\_\_, 102 S. Ct. 835 (1982).

3. Clean Water Act of 1977, § 404, 33 U.S.C. 1251 (1976 & Supp. IV 1980).

4. 450 U.S. 621 (1981); Callies, *Land Use Controls: An Eclectic Summary for 1980-1981*, 13 URB. LAW. 723 (1981).

5. This brief report obviously does not summarize all the matters that have recently occurred at the legislative and judicial levels which would be of interest to practitioners in the land use field. For more regular "early warnings" of such

velopment in land use section" is added, thanks to substantive contributions from judges and lawyers from several jurisdictions (England, Canada, Australia) and the random wanderings of the author (People's Republic of China). As many of our national legislative models (i.e., the ALI's *Model Land Development Code*)<sup>6</sup> and bills, as well as an increasing number of state bills, take some of their concepts if not their language from such "foreign" jurisdiction (especially the common law ones) such a review often provides a glimpse of things to come.

### **I. The Urban Enterprise Zone: Requiem for Local Zoning?**

Virtually the sole significant urban policy generated by the current Administration in Washington is the recently introduced Enterprise Zone Tax Act of 1982.<sup>7</sup> Modeled roughly on England's enter-

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trends and events, I have for years found the American Planning Association's monthly LAND USE PLANNING AND ZONING DIGEST to be immensely valuable and conveniently indexed. More current, but random, in coverage is the weekly newsletter LAND USE PLANNING REPORTS and APA Planning and Law Division's newsletter. Both carry state and regional developments and a running list of land use conferences as regular features. Finally, the following recent A.L.R. annotations may prove helpful to practitioners currently faced with particularly narrow issues requiring immediate solution based upon current case law: Annot., *Statutes of Limitation: Actions by Purchasers or Contractees Against Vendors or Contractors Involving Defects in Houses or Other Building Caused by Soil Instability*, 12 A.L.R. 4th 866 (1982); Annot., *Validity of Ordinance Restricting Number of Unrelated Persons Who Can Live Together in Residential Zone*, 12 A.L.R. 4th 238 (1982); Annot., *What Constitutes Accessory or Incidental Use of Religious or Educational Property Within Zoning Ordinance*, 11 A.L.R. 4th 1084 (1982); Annot., *Construction of New Building or Structure on Premises Devoted to Nonconforming Use As Violation of Zoning Ordinance*, 10 A.L.R. 4th 1122 (1981); Annot., *Standing of Civic or Property Owners' Association to Challenge Zoning Board Decision*, 8 A.L.R. 4th 1087 (1981); Annot., *Funeral Home As Private Nuisance*, 8 A.L.R. 4th 324 (1981); Annot., *Zoning: Validity and Construction of Provisions of Zoning Statute or Ordinance Regarding Protest by Neighboring Property Owners*, 7 A.L.R. 4th 732 (1981); Annot., *Enforcement of Zoning Regulation as Affected by Other Violations*, 4 A.L.R. 4th 462 (1981); Annot., *Validity of "War Zone" Ordinances Restricting Location of Sex-Oriented Businesses*, 1 A.L.R. 4th 1297 (1980); Annot., *Zoning Regulations Prohibiting or Limiting Fences, Hedges, or Walls*, 1 A.L.R. 4th 373 (1980); Annot., *Zoning or Licensing Regulation Prohibiting or Restricting Location of Billiard Rooms and Bowling Alleys*, 100 A.L.R. 3d 252 (1980); Annot., *Halfway Houses: Housing Facilities for Former Patients of Mental Hospital as Violating Zoning Restrictions*, 100 A.L.R. 3d 876 (1980).

6. MODEL LAND DEV. CODE (1975).

7. S. 2298, 97th Cong., 2d Sess., 128 CONG. REC. S2946-53 (1982).

prise zone legislation,<sup>8</sup> the Administration's bill closely parallels the Urban Jobs and Enterprise Zone Act of 1981, first introduced by Representative Jack Kemp (Republican/New York) and Robert Garcia (Democrat/New York) in 1980. The bills are analyzed in detail in another part of this issue.<sup>9</sup> Basically, both provide for a series of percentage breaks for businesses and their employees who locate or relocate in certain economically and physically deteriorated areas.<sup>10</sup> These areas, called enterprise zones, would be designated by the Secretary of the Department of Housing and Urban Development upon application of a local government, either in concert with the Administration's bill or with the tacit approval of the Kemp-Garcia bill the responsible state government.<sup>11</sup> Both bills apparently contemplate a "competition" among local government applicants for a limited number of available designations: twenty-five per year for three years.<sup>12</sup> Such designations would be based on criteria contained in the respective bills and to be formulated in regulations. Essentially, potential enterprise zones must meet eligibility requirements for receiving Urban Development Action Grants (UDAG)<sup>13</sup> as well as the following:<sup>14</sup>

1. Unemployment at 1.5 times the national average.
2. Twenty percent of the potential residential population "in poverty."
3. Seventy percent of the potential residents with incomes be-

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8. Contained mainly in Schedule 32 of the Local Government, Planning and Land Act, 1980, discussed in more detail in the foreign land use experience portion of this report, taken from a paper prepared by English solicitor, P. J. Purton (chairman of the Law Society's Local Government Committee) and Clive Douglas.

9. See Callies & Tamashiro, *Enterprise Zones* (forthcoming article in 15 URB. LAW.); S. BUTLER, ENTERPRISE ZONES: GREENLINING THE INNER CITIES (1981); Lloyd, *Enterprise Zones: The American Experience*, 1982 EST. GAZETTE 745; Myers, *Urban Enterprise Zones: UDAG Revisited?*, 33 HIST. PRESERVATION 12 (1981); G. STERNLIEB, NEW TOOLS FOR ECONOMIC DEVELOPMENT (1981).

10. H.R. 3824, 97th Cong., 1st Sess., 127 CONG. REC. S5837-41 (1981); S. 2298, 97th Cong., 2d Sess., 128 CONG. REC. S2946-53 (1982).

11. S. 2298, *supra* note 10, at § 101(a)(3)(A); H.R. 3824, *supra* note 10, at § 101(a)(1)(C).

12. S. 2298, *supra* note 10, at § 101(e); H.R. 3824, *supra* note 10, at § 101(a)(2)(C).

13. Housing and Community Development Act of 1974, § 119, 42 U.S.C. § 5318 (1976 & Supp. IV 1980).

14. S. 2298, *supra* note 10, at § 101(c)(3); H.R. 3824, *supra* note 10, at § 101(c)(3).

low eighty percent of the median income of the area as a whole.

4. Ten percent population loss.

5. Abandonment and blight.

From the perspective of land use policy, the most critical provision of the bills is Section 101(d) in the Kemp-Garcia bill, and the HUD fact sheet (presumably an outline for later regulations) accompanying the Administration bill, contemplating a local government "contract" to do its share of reducing *local* government barriers to business investment. Among other suggested "incentives" (real property tax holiday, foreign trade zones, etc.) is the suggestion that local governments virtually do away with land use controls within the zone.<sup>15</sup> Suggesting that regulatory relief which "will cost the state and local governments nothing" should (therefore) be "a central element of any state and local incentive package"<sup>16</sup> the HUD fact sheet heads the list of proposed regulating relaxation or elimination with zoning:

#### *Zoning Laws*

One web of entangling regulations which stifle economic activity stems from zoning laws. By restricting the uses to which property can be put, these laws often prevent businesses and other property owners from devoting their property to its most productive use. Many potential entrepreneurs may be prevented from going into business altogether because of restrictions on property they own or on other available property. The result is not only reduced property values, but inefficiency and misallocation of resources.

Moreover, within an enterprise zone, where substantial new but unknown economic activity is expected, the area should be opened up to a broad range of potential activities. Prejudging these activities by restrictive zoning regulations might forestall the potential boom altogether.

It is recognized, however, that zoning laws often are undertaken to preserve property values, for example, by prohibiting nuisance activities. Also, zoning may be the best means for preserving housing areas within enterprise zones. The relaxation of zoning restrictions, rather than their elimination, may, therefore, be the preferred course of action by local officials.<sup>17</sup>

A few items later come building codes:

#### *Building Codes*

Yet another web of local regulations stem from building codes. These regulations, though well-intended, often impose heavy, unnecessary costs on businesses and developers, thwarting economic activity. The regulations in many cases are poorly suited to the particular circumstances of businesses or developers, who could achieve the same result through a cheaper, alternative method. The codes are also often outdated, requiring the use of outmoded and

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15. The Administration's Enterprise Zone Proposal Sheet (March 1982).

16. *Id.* at 17.

17. *Id.*

unnecessarily costly methods. Featherbedding requirements are also often included in the codes, again unnecessarily increasing costs.

Purging the codes of these drawbacks would be a beneficial contribution to enterprise zones. Another alternative is to impose liability on builders for defects in their buildings and require them to have insurance. Since the insurance company would have to pay for any defects, it would not issue insurance for unsafe buildings. Yet competition would force it to maintain the flexibility to adapt to the conditions of each builder and avoid the imposition of unnecessary costs.<sup>18</sup>

The fact sheet also suggests a vastly expedited permitting process, including a "one-stop shopping office for permits":

*Permit Requirements*

Entrepreneurs attempting to start new businesses are often faced with a myriad of permit requirements which must be satisfied before the business can begin. In addition to the sheer burden of complying with these requirements, businessmen are often faced with substantial delays because of poor administration of permit issuance. In some cases, denial of a permit will unnecessarily force a business establishment out of existence.

One way of addressing these problems would be to establish a one-stop shopping office for permits for enterprise zone businesses. Another alternative is to eliminate most or all of these requirements. An entrepreneur in an enterprise zone should not have to get the government's permission to start a business.<sup>19</sup>

While zoning and building codes no doubt do contribute to the delay many developers encounter in undertaking land development projects, it is somewhat alarming to have the nation's major urban policy department characterize them as "entangling regulations" and a "web of regulations" which "stifle economic activity." Obviously any exercise of the police power results in some restriction of freedom. Yet the tradeoff is supposed to be the protection of the health, safety and welfare of the people for whom the government is responsible in passing the regulation. Surely HUD is aware of the other purposes of zoning—that is, to protect citizens, implement plans, preserve amenities, protect property values. Indeed, some commentators have suggested it was business which foisted zoning upon us in the first place!<sup>20</sup> In any event, virtually every city, village and county in the United States has some rudimentary form of zoning, and in most places, it is alive and well.<sup>21</sup>

As for building codes, they go back to our basic health laws. Contradictory and outdated though some may be, few would

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18. *Id.* at 19.

19. *Id.*

20. *See*, J. DE NUEFVILLE, *THE LAND USE POLICY DEBATE IN THE U.S.* 1-2 (1981).

21. C. WEAVER & R. BABCOCK, *CITY ZONING: THE ONCE AND FUTURE FRONTIER* (1979).

consider them simply a necessary evil. As for permitting requirements, the call for simplification is not new,<sup>22</sup> and if the Administration's urban enterprise zone package can accomplish some streamlining of the process, so much the better.

Once again, it is not so much the need for *reform* of certain land use controls that is troublesome about HUD's fact sheet items on zoning and building codes, but the bald and inaccurate characterization of them as basically evil and unnecessary. This is a remarkable attitude by the nation's guardian of our urban environment, and somewhat at variance with Administration policy to leave local matters—like zoning—to local government.

So much for what HUD will require of local government. What will the federal government provide as incentives? The answer is not a whole lot, especially as compared with England's enterprise zone program. Under the Administration's proposal employers would be allowed tax credits equal to five to fifty percent of wages paid to eligible zone employees.<sup>23</sup> Enterprise zone firms would be eligible for elimination of capital gains tax, an increase in tax credits for investments in the zone, and an extended loss carry-over.<sup>24</sup> Zone employees would be eligible for an income tax credit equal to five percent of their qualified wages.<sup>25</sup> Provisions are also included for regulatory relief and the establishment of foreign trade zones.

By comparison, the United Kingdom Act provides for 100 percent exemption from their equivalent to capital gains tax on all land, 100 percent allowance for income tax purposes for all capital expenditures on industrial and commercial buildings, direct exemption from all real property tax for ten years (repaid to local governments by the national government) and lifting of most land use controls (in accordance with a predetermined, simple zone plan) *except building codes* and environmental laws.<sup>26</sup>

Although the tax breaks at the federal level may seem generous, with the Administration predicting a seventy-five percent tax reduction for average zone corporations,<sup>27</sup> it may not match the incentives offered by the British government because no provisions are made at the federal level for the elimination of real

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22. See, e.g., F. BOSSELMAN, D. FEURER & C. SIEMON, *THE PERMIT EXPLOSION* (1976).

23. S. 2298, *supra* note 10, at § 201.

24. *Id.*

25. S. 2298, *supra* note 10, at § 202.

26. The Local Gov't, Planning and Land Act of 1980, Schedule 32.

27. 127 CONG. REC. S. 2945 (1981).

property taxes. Under the United States proposals, a business with no income tax liabilities may still be burdened with real property taxes.

This brief summary is not meant to replace the analysis elsewhere in this issue.<sup>28</sup> Indeed, several workshops and conferences—including one sponsored by our Section<sup>29</sup>—were recently devoted to the subject, at which it appears that many local governments around the country are preparing to apply for enterprise zone designation as soon as national legislation is passed.<sup>30</sup> Indeed, some *local* enterprise zone bills have already become law in some states.<sup>31</sup> However, even here and at this stage, a few questions are worth raising.<sup>32</sup>

1. Will they attract *new* business or merely cause existing business to move in—and should it matter?
2. What is the focus besides redevelopment of an “economically deteriorated” area—to help small or large business—and should it matter?
3. What protection for land use if planning/zoning controls are lifted—such as for historic buildings and districts?
4. Will “border” businesses just outside the zones be adversely affected?
5. Will private landlords raise rents to small businesses thereby negating the effect of tax breaks?
6. Will the numerous owners of *public* land transfer it in fee, as many had hoped, or will they rent only and impose conditions by means of lease covenants as onerous as the newly lifted land control?
7. Will skilled workers be “poached” from areas outside the enterprise zone?
8. What is the long-term effect of local property tax exemption on the national economy, especially if more zones are designated?

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28. Callies & Tamashiro, *supra* note 9.

29. Enterprise Zone Workshop (sponsored by the Section on Urban, State and Local Gov't of the ABA) (May 4, 1982, Washington, D.C.).

30. *Accord* 47 PLAN. 8 (May 1981). The following states have introduced enterprise zone enabling legislation: Indiana, New York, California and Illinois.

31. Urban Enterprise Zone Act, VA. CODE §§ 59.1-270-84 (1980 & Supp. 1982).

32. D. Callies, Enterprise Zones: British Experience Applicable to U.S. Proposals (May 12, 1982) (unpublished paper presented at the National Conference of the Am. Plan. Ass'n. Dallas, Texas); Honolulu Advertiser, July 26, 1981, at G-3.

The answers are not at all clear, but some glimmerings may be had from recent United Kingdom experience.<sup>33</sup> So far fourteen enterprise zones have been formally designated by the Central Government<sup>34</sup> from among many more which made application. Ranging in size from a few dozen to several hundred acres, few of the sites are entirely vacant (vacant Ford and Dunlop plants at Speke, Liverpool; docks and buildings at Isle of Dogs and Salford/Trafford, for example), but many have large undeveloped acreage (i.e., Swansea). In some zones (Swansea, Clydebank, Speke, Wakefield, Corby) the land is principally government owned; in others (Dudley, Tyneside, Belfast, Hartlepool) it is mostly privately held.<sup>35</sup>

By and large, the principal land use restrictions applicable to the sites are environmental, health and building codes, and restrictions on retail use. Each of the local authorities involved have agreed in advance that commercial and industrial buildings within certain height limits (and at times excluding particularly noxious uses) will be permitted without further application for such, as planning permits. The retail limitations—some quite severe<sup>36</sup>—reflect local merchants' concern for survival of existing retail centers, should discount centers ("hypermarkets") locate in the zones with all the benefits such locations would confer.

So far the response of potentially *new* business to the zones has been fair to good, though it is yet unclear how much represents a mere "shift over the boundary." Thus, for example, since designation,<sup>37</sup> thirteen "speculative" units of industrial development have been completed at Dudley; forty more have been completed at Salford/Trafford; twenty-four have been completed at Tyneside, and construction has begun on a 37,000-square foot new facility for Vickers; sixty-eight new units are complete at Speke; more than twenty new companies have moved into Clydebank; and thirty-two new firms have moved into the Swansea

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33. Further analysis is contained *infra* pp. 839-44 from a thorough analysis made by English solicitors P.J. Purton and Clive Douglas.

34. Belfast, Clydebank, Glasgow, Corby, Dudley, Hartlepool, Isle of Dogs, Newcastle/Gateshead, Salford, Trafford, Speke (Liverpool), Swansea and Wakefield. Financial Times Survey, Sept. 8, 1981, at 11-14, and The Times, Special Report, March 9, 1982.

35. *Id.*

36. Corby, for example, will still require planning permission for food, drink and retailing business in excess of 2,475 square feet. Financial Times Survey, *supra* note 34.

37. DOE Enterprise Zone Projects Review (Nov. 1981); The Times, Special Report, March 9, 1982.



zone, *but* twenty-five moved from other parts of Swansea, and only seven are “new” ventures. Some at Salford/Trafford say most inquiries and move-ins come from within five miles of the zone. Do the zones then merely “reshuffle” business? Moreover, it is reported that large rent increases have occurred since designation in Swansea and Tyneside, and land *in* the Dudley zone is twice as expensive as that just outside.<sup>38</sup>

In several instances, zone boundaries have been modified to bring in businesses just outside the original zones.<sup>39</sup> Also, the response of major institutional investors has not been terribly positive, with some expressing concerns normally identified with the Town and County Planning Association and some amenity groups: that the relaxation of planning controls will lead to hasty and unfortunate development decisions with detrimental effect on nearby properties.<sup>40</sup> Finally, the Conservative government announced (in July of this year) its intention to approve ten additional zones.<sup>41</sup> It appears the British, at least, view enterprise zones as in some measure successful.

## II. Boulder, the Demise of Home Rule, and Land Use Implications

The decision today effectively destroys the “home rule” movement in this country, through which local governments have obtained, not without present state opposition, a limited autonomy over matters of local concern.<sup>42</sup>

Has the United States Supreme Court destroyed home rule? Yes, according to its Chief Justice and two Associate Justices. It has done so by applying the federal antitrust laws to the home rule city of Boulder, Colorado. If, as the majority of the Court writes, “[o]urs is a ‘dual system of government’ which has no place for sovereign cities,”<sup>43</sup> then many cities will find their home rule powers drastically curtailed. Will that make a difference?

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38. Purton & Douglas, *Enterprise Zones in the United Kingdom* (Paper prepared for the land use, planning and zoning committee, Section on Urban, State and Local Government, American Bar Ass’n) (March 1981).

39. Swansea is an example.

40. See Remarks of Chief Swansea Planning Officer Maurice Howell, in BDP Enterprise Zone Workshop Report of Proceedings (November 1981). See also, Greg Lloyd, *Enterprise Zones: Some Economic and Spatial Implementation* (June 1980) (unpublished discussion paper).

41. Interview with John Stambollovian, Senior Planning Officer, Department of the Environment, London, Sept. 16, 1982.

42. *Community Communications Co., Inc. v. City of Boulder*, \_\_\_\_\_ U.S. \_\_\_\_\_, 102 S. Ct. 835 845 (1982) (Rehnquist, J., dissenting).

43. *Id.*, 102 S. Ct. at 840 (maj. op.).

"Home rule" is a catchy bit of jargon applied to cities and counties which wrest control of local affairs from the state. Under our federal system of government, the states are the source of sovereign governmental power. The federal government has only such power that the states gave to it in 1789. Therefore, those powers not specifically granted to the federal government in the United States Constitution continue to reside in the states. The only limit on state sovereignty is its own *state* constitution, setting out what its citizens have decided their sovereign states may *not* do.

It is here—in the state constitution—that many cities and counties have wrung from the state the authority to manage all or part of their own affairs. So-called "local government" sections of the state constitution set out these powers. Without this limit on state power over cities and counties, such local governments are mere creatures of the state, to be governed entirely by state legislation—to be created, changed, even abolished at the discretion of the state legislature.

Enter *Community Communications Company, Inc. v. City of Boulder*.<sup>44</sup> Exercising extremely broad home rule power guaranteed by the Colorado Constitution, Boulder passed an "emergency" ordinance prohibiting a cable TV firm from expanding its business for three months while Boulder drafted a model cable television ordinance. Community Communications claimed the emergency ordinance restrained its business contrary to the federal antitrust laws. Indeed, just four short years ago the Supreme Court *did* hold that non-home rule cities were subject to such laws. But Boulder claimed that *home rule* cities and counties were, like sovereign states, immune because, like states, they were sovereign because the people delegated power to them through their constitution.

The Supreme Court rejected Boulder's contention, observing that "we are a nation of *states*, a principle that makes no accommodation for sovereign subdivisions of states."<sup>45</sup> The Court held the Boulder ordinance subject to the antitrust laws, like the ordinance of any non-home rule city would usually be.

The three dissenting justices were appropriately horrified. Thundered Rehnquist: "[t]he Court's decision today will radically alter the relationship between the states and their political

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44. *Id.*

45. *Id.*

subdivision. . . . In order to defend itself . . . the home rule municipality will have to cede its authority back to the states.”<sup>46</sup>

Well, maybe and maybe not; it is possible to confine the Court’s opinion within the bounds of municipal liability for violation of our federal antitrust laws, a rather specialized, arcane subject of interest principally to municipal and antitrust lawyers.

On the other hand, it is at least suspicious that no less than twenty-two states joined Colorado in filing “friend-of-the-court” briefs *against* Boulder and its home rule claims. Whether this represents, as the dissenting justices suggest, the state seizing an “opportunity to recapture the power it has lost over local affairs”<sup>47</sup> remains to be seen. It is too early to bury our local governments under the epitaph, *sic transit home rule*.

The primary implications for land use policy lie in the continued struggle between many states and their local governments over local land use control. In the late 1960s and early 1970s, many states took back some of the power to regulate land which it had delegated to local governments by means of state enabling acts.<sup>48</sup> This did not occur without resistance, and many local governments have reasserted their authority, often through the vehicle of home rule status.<sup>49</sup> If indeed home rule is about to die a slow death, then the states will win the struggle for control over the regulation of private land use.

Whether this is good or bad depends upon one’s point of view. Clearly many municipalities had used the power to zone for narrow, parochial, discriminating, damn-the-region purposes.<sup>50</sup> On the other hand, many more municipalities had not. Moreover, the experience of regional and state land use control has been fraught with complaints about insensitivity to local problems and unresponsiveness to local citizens. The way to resolve what may be an inherent state-local land use conflict is *not* to strip home rule cities of their power and “return to the dark ages before home rule.”<sup>51</sup>

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46. *Id.* at 851 (Rehnquist, J. dissenting).

47. *Id.* at n.7.

48. See F. BOSSELMAN & D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971).

49. See C. WEAVER & R. BABCOCK, *CITY ZONING: THE ONCE AND FUTURE FRONTIER* (1979); Callies, *The Quiet Revolution Revisited*, 46 J.A. PLAN. A. 135 (1980).

50. R. BABCOCK & F. BOSSELMAN, *EXCLUSIONARY ZONING* (1973); *THE USE OF LAND* (W. Reilly ed., 1974); F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* (1973).

51. Freilich & Carlisle, *The Community Communications Case: A Return to the Dark Ages Before Home Rule*, 14 URB. LAW. v. (Spring 1982).

### III. The Taking/Compensation Issue: After San Diego

The gradual erosion of Holmes' "regulatory taking" doctrine<sup>52</sup> was brought to an abrupt and unanticipated halt in early 1981 by the strong dissent in *San Diego Gas and Electric Co. v. City of San Diego*.<sup>53</sup> There, it will be recalled, Mr. Justice Brennan, speaking for four of his brethren, declared not only that compensation was due for regulatory takings, but set out just how he would measure such compensation.<sup>54</sup> The public and private sectors have been attempting to deal with the Supreme Court's language ever since. A few courts have decided appeals based upon that dissent, with predictable results. However, in most cases, the landowner is appealing from the denial of a building permit on land once properly zoned for development, but for which a permit to build has been denied for other reasons *or* a very recent rezoning has made development all but impossible. Moreover, in most instances, the owner has been left with virtually *no* use of the land in question.

Nowhere has the language of the *San Diego* dissent struck such a responsive chord as in New Hampshire. Reinforcing its strong property-rights protection stance, that state's supreme court in June of 1981<sup>55</sup> set out both limits on the exercise of the police power and, quoting extensively from the Brennan dissent, standards for measuring landowner compensation where those limits are exceeded.

The case arose from municipal denial of a subdivision permit on 124 acres of recently-purchased, undeveloped woodlands in the City of Keene. The owner, a real estate developer, purchased the parcel in 1973 for \$45,000 for residential development purposes. At the time, it was zoned "rural," and such development was a permitted use.<sup>56</sup> Upon application for subdivision approval in 1975, the city planning board advised Burrows that it wished to preserve the land for open space and to delay its application while funds were obtained for the city to purchase the property, to which Burrows agreed. However, the city's offer of \$27,000 was inad-

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52. *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), discussed in detail in F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 50. For a recent approach, J. Humbach, *A Unifying Theory for the Just Compensation Cases: Takings, Regulation and Public Use*, 34 RUTGERS L. REV. 243 (1982).

53. 450 U.S. 621 (1981).

54. Discussed in detail in the 1981 report of the Land Use, Planning and Zoning Committee, 13 URB. LAW. 723, 723-29 (1981).

55. *Burrows v. City of Keene*, 121 N.H. 590, 432 A.2d 15 (1981).

56. *Id.*, 432 A.2d at 17.

quate, and Burrows proceeded with his subdivision application, which was formally denied in late 1976. The city then placed the entire parcel in a "Conservation District" which permitted only nonstructural uses of land. Litigation followed.<sup>57</sup>

On appeal, the New Hampshire Supreme Court considered essentially two issues:

1. Was the denial of subdivision approval a constitutionally protected "taking" of property?
2. If so, was Burrows entitled to damages, or to declaratory relief only?

The court based its determination on the first issue on the New Hampshire Constitution which states that "no *part* . . . of a man's property may be taken from him without his consent."<sup>58</sup>

The court's basic predilection is apparent from its opening salvo on private property rights, in which it gratuitously misinterprets 500 years of English property law, and the Magna Carta in the bargain:

The substantive issue raised in this case involves a principle that lies at the very foundation of civilized society as we know it. The principle that no man's property may be taken from him without just compensation reaches at least as far back as 1215, when on "the meadow which is called Runnymede" the Barons of England exacted from King John the Magna Carta, which contains at least three references to this fundamental truth.<sup>59</sup>

The court then recites the familiar Holfeldien definition of property rights:

"Property," in the constitutional sense, is not the physical thing itself but is rather the group of rights which the owner of the thing has with respect to it. The term refers to a person's right to "possess, use, enjoy and dispose of a thing and is not limited to the thing itself." The property owner's right of "indefinite user (or of using indefinitely) . . . necessarily includes the right . . ." to exclude others from using the property, whether it be land or anything else. "From the very nature of these rights of user and of exclusion, it is evident that they cannot be materially abridged without, *ipso facto*, taking the owner's 'property'." *Id.* "The principle must be the same whether the owner is wholly deprived of the use of his land, or only partially deprived of it. . . ."<sup>60</sup>

The court concludes that the "just compensation" requirement applies to regulation, as well as physical taking, of property, quoting the *San Diego* dissent:

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57. *Id.*, at 17-18.

58. *Id.*, at 18.

59. *Id.*, at 18. See F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 50, at ch. 5 & 6, for a thoroughly researched contrary view of Magna Carta and property law through the United States' colonial period.

60. *Id.*, 432 A.2d at 19 (citing cases).

Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. *San Diego Gas & Elec. Co. v. City of San Diego*, 101 S. Ct. at 1304 (Brennan, J., dissenting).<sup>61</sup>

However, even in New Hampshire, not every regulation of property results in a taking:

This is not to say that every regulation of private property through the police power constitutes a taking. Reasonable regulations that prevent an owner from using his land in such a way that it causes injury to others or deprives them of the reasonable use of their land may not require compensation. Nor do reasonable zoning regulations which restrict economic uses of property to different zones and which do not substantially destroy the value of an individual piece of property effect a taking requiring compensation. But arbitrary or unreasonable restrictions which substantially deprive the owner of the "economically viable use of his land" in order to benefit the public in some way constitute a taking within the meaning of our New Hampshire Constitution requiring the payment of just compensation. *The owner need not be deprived of all valuable use of his property. If the denial of use is substantial and is especially onerous, a taking occurs.* There can be no set test to determine when regulation goes too far and becomes a taking. Each case must be determined under its own circumstances. The purpose of the regulation is an element to be considered.<sup>62</sup>

Applying these criteria to the instant case, the court begins by observing that it "does not come anywhere near the line dividing constitutional and unconstitutional regulation."<sup>63</sup> In the court's view—reasonable, certainly, from the facts—the city simply wanted Burrows' land for open space, and when Burrows wouldn't accept its price, it

... elected to accomplish its purpose by regulating the use of the property so as to prohibit all "normal private development." It is plain that the city and its officials were attempting to obtain for the public the benefit of having this land remain undeveloped as open space without paying for that benefit in the constitutional manner. The city sought to enjoy that public benefit by forcing the plaintiffs to devote their land to a particular purpose and *prohibiting all other economically feasible uses of the land, thus placing the entire burden of preserving the land as open space upon the plaintiffs.* The trial court found, in a well-considered opinion, that the uses permitted were "so restrictive as to be economically impracticable, resulting in a substantial reduction in the value of the land" and that they prevented a private owner from enjoying "any worthwhile rights or benefits in the land."<sup>64</sup>

Turning to the compensation issue, the court first acknowledged that the California court had denied compensation to landowners in similar circumstances, relegating him to declaratory and man-

61. *Id.*, at 19.

62. *Id.*, at 19, 20 (emphasis added) (citing cases).

63. *Id.*, at 21.

64. *Id.* (emphasis added).

damus relief only, and rejected it “out of hand.”<sup>65</sup> It then adopted the Brennan measure of damages for regulatory taking, lock, stock and barrel:

We agree with Justice Brennan that it is always open to the governmental entity involved to rescind or repeal the offending regulation and thus avoid payment of damages for inverse condemnation from that point on. *Id.* at 1304–07. Until that is done, however, the owner’s property has been taken during the interim period and he is entitled to compensation for that taking. *Id.* Limiting the landowner to actions which only invalidate the offending regulation will encourage municipal planners and other public officials to attempt to throw the burdens accompanying “progress” upon individual landowners rather than on the public at large. The allowance of damages for inverse condemnation during the period of the taking, however, should encourage such officials to stay well on the constitutional side of the line, *San Diego Gas and Elec. Co. v. City of San Diego*, *supra* at 1308 n.26 (Brennan, J., dissenting), and should also discourage harassment of property owners by repeated amendments of zoning regulations and the enactment of new ones. *See id.* at 1305–06 n.22.<sup>66</sup>

For good measure, the court threw in an invitation to sue the city for civil rights violations under Section 1983 of the Civil Rights Act:

Planners and other officials should be aware of possible personal liability for bad faith violations of a landowner’s constitutional rights which may go beyond the damages recoverable for inverse condemnation. Cities and towns should also be aware of possible 42 U.S.C.A. § 1983 actions for damages for violations of the constitutional rights of citizens to be compensated for injuries suffered. *Owen v. City of Independence*, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980); *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).

As we have said before, public officials have a duty to obey the constitution, and they have no right or legitimate reason to attempt to spare the public the cost of improving the public condition by thrusting that expense upon an individual. . . . *The greater the cost of accomplishing something which is considered to be in the public interest, the greater the reason why a single individual should not be required to bear that burden.*<sup>67</sup>

The *Keene* case is hardly your typical “difficult case” as far as regulatory takings go. The city’s history of attempting to acquire the property for open space did little to convince the court that it has a reasonable police power motive for prohibiting all structural use. No floodplain or other natural limitation, here. It comes as close as possible to the usually anecdotal zoning for park purposes.

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65. *Id.*, at 20.

66. *Id.*

67. *Id.* (emphasis added) (citing cases). *See also* Kraft v. Malone, 313 N.W.2d 758 (N.D. 1981), where refusal to grant a building permit for a single-family residence in an area zoned for the purpose because the city wanted to retain the drainage character of the property also amounted to a regulatory taking, for which the city had to pay the fair market value of the lot in question.

Moreover, there is precious little economic use left on property that was recently purchased, and expeditiously planned, for residential development by the owner. The case is thus distinguishable from most "taking issue" cases and, by itself, probably does little damage to recent notions of what constitutes a taking.<sup>68</sup> However, once such a taking is found, the New Hampshire court's blythe acceptance of the Brennan dissent is more troublesome, and the open invitation to file a Section 1983 action is positively chilling. One suspects that the line between regulation and taking, in New Hampshire at least, is about as far toward compensation for all but the most traditional of zonings we have seen in at least a decade from a state supreme court.

#### IV. The Army Corps of Engineers and Section 404 of the Clean Water Act: Coastal Protection with a Vengeance<sup>69</sup>

Section 404 of the Federal Water Pollution Control Act<sup>70</sup> authorizes the Army Corps of Engineers (Corps) to regulate the discharge of dredge and fill materials into the navigable waters of the United States. As it is virtually impossible to remove such materials from a body of water without some of it falling back into the water (technically a "discharge") and coupled with expanded definitions of navigability,<sup>71</sup> the Corps' permitting authority thus extends to virtually every public or private development activity which touches bodies of "navigable" waters. Moreover, regulations and amendments to the act specifically subject wetlands to the same Corps permit review (although the same amendments also specifically exempt certain agricultural, silvicultural and similar activities from case-by-case review).

The potential land use implications, should the Corps vigorously pursue its permitting authority, has been vastly expanded by a

68. See D. Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L. Q. 491 (1981); D. Kmiec, *Deregulating Land Use*, 130 U. PA. L. REV. 28 (1981).

69. I am indebted to Trudy Senda, Associate Editor-in-Chief of the University of Hawaii Law Review, and Robert Rowland, a student in the University of Hawaii's Urban and Regional Studies Program, for permission to use their Land Use Workshop paper on *Regulating Hawaii's Wetlands* in preparing this section of the report.

70. 33 U.S.C. § 1251 (1976 & Supp. IV 1980).

71. Thanks largely to *Natural Defense Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975) and the resulting regulations at 33 C.F.R. §§ 209.120(d)(2)(i)(b) and (h) (1977).



recent series of decisions from the United States Court of Claims.<sup>72</sup> In *Deltona Corp. v. United States*,<sup>73</sup> the court of claims upheld the Corps' denial of a dredge and fill permit for the third phase of a 10,000-acre residential community on Florida's Gulf Coast. While Deltona had obtained permits for its first two phases, the court noted that the last application was made *after* the Corps' authority had been substantially expanded. Thus, even though it had been deprived of much of the use of this one large parcel, the court held that "[D]eltona is no longer able to capitalize upon a reasonable investment-backed expectation which it had every justification to rely upon until the law began to change."<sup>74</sup> The court noted that, in response to Deltona's "taking" claim, it had developed three other parcels, and could develop certain upland parcels *without* Corps approval.

Of special interest was the court's citing with approval the new Corps regulations which permitted it to withhold permits in the event that dredge and fill activities would destroy historical and aesthetic coastal values as well:

On April 4, 1974, the Corps published further revised regulations so as to:

- (a) incorporate new permit programs under Section 404 of the FWPCA;
- (b) incorporate the requirements of new federal legislation by adding to the factors to be weighed in the public interest review, including: economies; historic values; flood damage prevention; land-use classification; recreation; water supply and water quality;
- (c) adopt further criteria to be considered in the evaluation of each permit application, including the desirability of using appropriate alternatives; the extent and permanence of the beneficial and/or detrimental effects of the proposed activity; and the cumulative effect of the activity when considered in relation to other activities in the same general area;
- (d) institute a full-fledged wetlands policy to protect wetlands subject to the Corps' jurisdiction from unnecessary destruction.<sup>75</sup>

To much the same effect is *Jentzen v. United States*<sup>76</sup> and *Lavey v. United States*.<sup>77</sup>

#### V. Plans as Laws: *Consistency Redux*<sup>78</sup>

The relationship between plans and laws continues to trouble citizens, councils and courts across the country. Should there be a

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72. See *infra* notes 73, 76, & 77.

73. 657 F.2d 1184 (Ct. Cl. 1981).

74. *Id.* at 1191.

75. *Id.* at 1187-88.

76. 657 F.2d 1210 (Ct. Cl. 1981).

77. 661 F.2d 145 (Ct. Cl. 1981).

78. Much of this section is taken from the report of the subcommittee written by Daniel W. O'Connell, its chairman.

required consistency?<sup>79</sup> By 1981, fourteen states required consistency between local land use plans and land use regulations. In several other states, the courts have imposed their own consistency requirements.<sup>80</sup>

### A. California

Two appellate courts have addressed major plan issues. *Camp v. Mendocino County Board of Supervisors*,<sup>81</sup> is the first appellate court decision which discusses inadequacies of certain mandatory elements. *Sierra Club v. Kern County Board of Supervisors*<sup>82</sup> held that a precedent clause in a general land use plan element was void. The court further stated that since the general plan was internally inconsistent, "the zoning ordinance under review could not be consistent with such plan and *was invalid when passed*."<sup>83</sup>

The court of appeals in *Camp* held the county did not have a valid general plan because the land use, housing, noise and circulation elements were not in substantial compliance with the specifications for such elements in the state law. Substantial compliance "means *actual* compliance in respect to the substance essential to every reasonable objective of the statute as distinguished from

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79. In spite of this continuing academic and professional debate on the role of the local comprehensive plan in land use regulation, the "plan as law" movement marches on. Numerous publications advocate a more serious role for the local comprehensive plan:

1. MODEL LAND DEV. CODE (adopted by the American Law Institute on May 21, 1975).
2. Housing for All Under Law: New Directions in Housing, Land Use and Planning (1978 report of the American Bar Association Advisory Committee on Housing and Urban Growth).
3. The Practice of Local Government Planning (International City Management Ass'n/American Planning Ass'n, 1979).

The ABA report contains numerous policy statements in favor of mandatory planning and legal consistency, i.e.:

As the substantive and procedural elements of land-use decisions increase in complexity and include new objectives such as environmental protection, lower income housing needs, and regional growth management, comprehensive planning is essential as a policy base to insure internal consistency, to provide predictability, and to reduce the tendency toward arbitrary local decision making. State enabling legislation, traditionally permissive in its approach to local planning, should be amended to require local comprehensive planning and to require that the exercise of local land-use controls be consistent with local comprehensive plans. (Policy No. 2, at 408).

80. Details of these requirements can be found in Netter & Vranicar, *Linking Plans and Regulations: Local Responses to Consistency Laws in California and Florida*, AMERICAN PLANNING ASS'N (PAS Report No. 363, 1981).

81. 123 Cal. App. 3d 334, 176 Cal. Rptr. 620 (1981).

82. 126 Cal. App. 3d 698, 179 Cal. Rptr. 261 (1981).

83. *Id.*, 179 Cal. Rptr. at 264 (emphasis added).

mere technical imperfections of form.”<sup>84</sup> Indeed, as the court observed, one wonders whether there was a plan at all:

It may be mentioned that the “plan” consists of a sheaf of uncoordinated documents stuffed into an unlabelled carton. The trial court observed in one of its memorandum decisions as follows: “Presented to the court with the representation that it constituted the Mendocino County General Plan was a somewhat crumpled grey cardboard box . . . containing an unassembled assortment of papers and pamphlets variously identified . . . [by titles and descriptions]. . . . The physical composition of this “general plan” would appear to make resort to it for planning information an awkward exercise and would also seem to generate doubt concerning the integrity of the plan, when so many of its elements are merely deposited loose in a cardboard box.” We agree with these comments.<sup>85</sup>

The *Sierra Club* case dealt with the following precedence clause:

If any conflict exists between the adopted open space and conservation elements and this land use element, this element should *take precedence* until the open space and conservation can be reevaluated and amended, if necessary.<sup>86</sup>

A rezoning from A-1 (light agricultural) to M-P and E-3 R-S (mobile home and estate-suburban-residential) was consistent with the maps of the land use element, but not with the open space map. The trial court found the precedence clause made the general plan internally consistent. The appellate court found such an interpretation would frustrate the intent of the Open Space Lands Act<sup>87</sup> because counties could simply subordinate the open space element to other elements of the general plan. The real kicker is the statement that “[S]ince the general plan is internally inconsistent, the zoning ordinance could not be consistent with such plan . . . and was invalid when passed.”<sup>88</sup>

This issue became moot when the precedence clause and inconsistencies were removed as to the area in question, but the problem remained in other areas of the county. The court treated the matter as an issue of broad public interest and therefore held the precedence clause was void as not permitted under the appropriate sections of the state law.

The California legislature is also considering major modifications to California’s local plan requirements. A state planning law task force, made up of members from the California Planners Foundation, APA (California chapter), and the Office of Planning

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84. 123 Cal. App. 3d 334, 176 Cal Rptr. 620 (1981).

85. *Id.*

86. 126 Cal. App. 3d 698, 179 Cal Rptr. 261 (1981) (emphasis added).

87. *Id.*

88. *Id.* at 264.

and Research, has drafted proposed revisions to the state's planning law. Several major features of these revisions are:

- a. A simplification of the general plan requirements, elimination of references to elements, elimination of overlapping and excessive detail in descriptions of subjects which must be covered.<sup>89</sup>
- b. The format of the general plan is left to local discretion.<sup>90</sup>
- c. Cities and counties are given maximum latitude in structuring the planning function.<sup>91</sup>
- d. Standards of judicial review are established for local planning and regulatory actions.<sup>92</sup>
- e. Additional guidance is provided on consistency in implementing actions, including a definition of consistency and list of actions which must be consistent with the general plan.<sup>93</sup>
- f. The inclusion of a requirement for a five year capital improvement program by all local agencies undertaking public works projects.<sup>94</sup>
- g. A twelve-member state planning and development council is created to prepare the report on goals and policies of state interest and to identify and help resolve interagency conflicts.<sup>95</sup>

The draft also includes other revisions to existing laws covering state, areawide and local planning. Because of limited time, the task force did not propose revisions to the zoning statutes, the Subdivision Map Act and other laws such as those governing permit processing.<sup>96</sup> The task force intends to work on these statutes in the future.

## B. *Colorado*

The Supreme Court of Colorado addressed the plan issue in one of three cases relating to the right of voters to subject rezoning decisions to either initiative or referendum. In *Margolis v. District Court*,<sup>97</sup> an amendment to the comprehensive plan of a statutory

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89. § 65301-2.

90. § 65303.

91. § 65055-60.

92. § 65014.

93. § 65450-52.

94. § 6550-55.

95. § 65035-38.

96. AB 884.

97. 638 P.2d 297 (Colo. 1981).

city was also the subject of referendum petitions. The court held that the right of referendum applies to rezonings, which for the purpose of referendum and initiative, are to be considered legislative actions. However, the court held that a master plan is not subject to referendum because the statutory plan is advisory only and is not legislative in character.<sup>98</sup>

Similarly, in *Concerned Citizens of Park County v. Board of County Commissioners*,<sup>99</sup> the Colorado Court of Appeals held that a county zoning resolution need not be preceded by the adoption of a formal written comprehensive plan. Colorado statutes applicable to counties, unlike those applicable to statutory municipalities, omit the language "in accord with a comprehensive plan."

### C. Florida

Many plans have been adopted since the Local Government Comprehensive Planning Act (LGCPA)<sup>100</sup> was enacted in 1975. As of July 1, 1981 (deadline for completion) 367 of 461 local governments (79.6 percent) had adopted complete comprehensive plans, including 56 of 67 counties, 308 of 391 municipalities and all three special districts.

Although most local governments have *prepared* comprehensive plans, few have taken meaningful steps to *implement* them. The state has no specific role in guiding the plan implementation process, but has provided limited technical assistance through the review of zoning and subdivision regulations for local governments. While several court decisions have dealt with plan issues, they are not significant.<sup>101</sup>

### D. Hawaii

As noted in the 1981 report,<sup>102</sup> Hawaii ties planning to zoning more closely than any state in the union. However, for the third year in a row, the state legislature failed to pass the twelve subject-specific<sup>103</sup> functional plans called for by Act 100,<sup>104</sup> the state plan which was

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98. *Id.* at 305-06.

99. 636 P.2d 1338 (Colo Ct. App. 1981).

100. FLA. STAT. ANN. §§ 163, 3161 (West 1970 & Supp. 1982).

101. See Arline, *The Consistency Mandate of the Local Government Comprehensive Planning Act*, 139 FLA. B.J. 661 (1981).

102. 13 URB. LAW. 723, 734-39 (1981).

103. Agriculture, conservation lands, energy, education, health, higher education, historic preservation, housing, recreation, tourism, transportation and water resources development.

104. HAWAII REV. STAT. § 226-1-105 (1976 & Supp. 1981).

written verbatim into Hawaii's statutes in 1978. If passed, the twelve plans will be binding on all state agencies, including the Land Use Commission which has the authority<sup>105</sup> to change the boundaries of Hawaii's four statewide zoning districts.<sup>106</sup> Meanwhile, Hawaii's governor has "promulgated" the plans by proclamation,<sup>107</sup> making them binding on all state agencies for the present.

The governor has also signed a plan for the development of a large area just east of Honolulu's downtown area and west of its huge Ala Moana Shopping Center (once the largest in the United States). Developed at a cost of millions of dollars by the Hawaii Community Development Authority,<sup>108</sup> the plan takes precedence over both Honolulu plans and zoning codes.<sup>109</sup> The plan calls for mixed-use development, primarily of a commercial nature, with most development, primarily of a commercial nature, with most development permitted only after a modified planned unit development process.<sup>110</sup>

Finally, the Honolulu City Council passed eight development plans (complete with detailed maps) required by the city charter which, once signed by the mayor, would take precedence over all subsequent zoning code amendments and subdivision approvals.<sup>111</sup> However, the mayor vetoed all of them, and only two were passed by the council over her veto.<sup>112</sup> Revision of the remaining six have bogged down while the council and mayor argue over whether the pending general plan revision for the county should precede any further work on the development plans.<sup>113</sup>

### E. Maryland

In Maryland, the decisions are split. In *Kanfer v. Montgomery County Council*,<sup>114</sup> the Maryland Court of Special Appeals reiter-

105. HAWAII REV. STAT. § 205-2 (1976 & Supp. 1981).

106. Agriculture, conservation, urban and rural. Ninety percent of Hawaii's land is in the first two classifications. See STATE OF HAWAII, DATA BOOK 155 (1981).

107. May 3, 1982.

108. HAWAII REV. STAT. § 206E-2 (1976 & Supp. 1981).

109. HAWAII REV. STAT. § 206E-33 (1976 & Supp. 1981).

110. State of Hawaii, Hawaii Community Development Authority, Draft Kakaako Community Development Plan at 1 (Nov. 2, 1981).

111. City and County of Honolulu, Revised Charter of the City and County of Honolulu, Chap. 4, § 5-409 (1973).

112. Callies, *Plans as Laws in Honolulu*, 34 LAND USE L. AND ZONING DIG. 3 (1982).

113. For a detailed description of the plans, see last year's report, *supra* note 102.

114. 373 A.2d 5 (Md. App. 1977).

ated the long-standing rule in Maryland that a master plan is at best a "flexible guide" or an intellectual prophecy of future development and is not entitled to the strong presumption of correctness attaching to comprehensive zoning actions. However, in *Board of County Commissioners of Cecil County v. Gasler*,<sup>115</sup> the Maryland Court of Appeals held that the State Zoning Enabling Act requires subdivision plans to be "consistent with the plan."

#### F. Montana

The Supreme Court of Montana in *Little v. Board of County Commissioners of Flathead County*,<sup>116</sup> strongly reinforced the master plan requirements in Montana's State Planning Enabling Act:

Why have a plan if the local governmental units are free to ignore it at any time? The statutes are clear enough to send the message that in reaching zoning decisions, the local governmental unit should at least substantially comply with the comprehensive plan (or master plan). This standard is flexible enough so that the master plan would not have to be undergoing constant change. Yet, this standard is sufficiently definite so that those charged with adhering to it will know when there is an acceptable deviation, and when there is an unacceptable deviation from the master plan . . . .

We are aware that changes in the master plan may well be dictated by changed circumstances occurring after the adoption of the plan. If this is so, the correct procedure is to amend the master plan rather than to erode the master plan by simply refusing to adhere to its guidelines. If the local governing bodies cannot cooperate to this end, the only alternative is to ask the legislature to change the statutes governing planning and zoning.<sup>117</sup>

#### G. Oregon

The Oregon planning legislation, as overseen by 1000 Friends of Oregon, provides one of the most sophisticated examples of the plan as law. In 1973, Oregon established a statutory statewide planning process whereby all state, city or county comprehensive plans implementing ordinances and regulations were to be in conformity with to-be-adopted statewide goals within a year of the goals' approval.<sup>118</sup> The statewide goals were to be drawn up by a Land Conservation and Development Commission (LCDC) which was also to review local plans and ordinances for compliance with the goals.<sup>119</sup>

The LCDC adopted fourteen goals by 1974, and an additional

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115. 401 A.2d 666 (Md. App. 1979).

116. 631 P.2d 1282 (Mont. 1981).

117. *Id.* at 1283.

118. OR. REV. STAT. §§ 197.225, 197.250 (1973 & Supp. 1981). See Morgan & Shonkwiler, *Statewide Land Use Planning In Oregon*, 11 URB. LAW. 1, 1 (1979).

119. OR. REV. STAT. § 197.040 (1973 & Supp. 1981).

five in 1975, most of which are land use related.<sup>120</sup> They were sufficiently controversial that a referendum to repeal the law was held (and failed) in 1976,<sup>121</sup> but the legislature imposed a moratorium on such goals in 1977.<sup>122</sup>

Oregon's system ties its land use plans and land use implementation regulations together very tightly. The "consistency" requirement is very strong. Each Oregon unit of local government prepares and adopts a comprehensive plan which:

1. must be consistent with the statewide goals (but not necessarily with their explanatory guidelines . . .);<sup>123</sup>
2. must then be implemented by subdivision, zoning and other land development regulations all within a year of the adoption of the state goals and their explanatory guidelines.<sup>124</sup>

It is apparently up to the counties to coordinate this consistency. Whether a unit of local government is in compliance with these consistency requirements can be determined through a compliance acknowledgment procedure resulting in a compliance "order" from the LCDC. Several dozen communities have received such an acknowledgment from the LCDC.<sup>125</sup> The LCDC also hears appeals on alleged goal violations by local governments.

The Oregon courts have been supportive of the statewide planning control system largely upholding the scheme in general. In *City of Sandy v. Board of Commissioners of Clackamas County*,<sup>126</sup> the county took "exception" for a zone change on 26.5 acres to allow a 90,000 square foot shopping center on rural agricultural land. The site lies 1.5 miles from the City of Sandy urban growth boundary and 4.0 miles from the City of Gresham boundary. The county dismissed several alternative rural locations because they were not currently planned and zoned for commercial use or were too small for the proposed shopping center. The State Agricultural Lands Goal (Goal 3) requires local governments and state agencies "to preserve and maintain agricultural lands."<sup>127</sup> If a county wants an "exception" from Goal 3, it must show that there are no alternative locations that could accommodate the use without

120. Morgan & Shonkwiler, *supra* note 118, at 5; T. PELHAM, STATE LAND USE PLANNING AND REGULATION (1979).

121. T. PELHAM, *supra* note 120, at 8.

122. Morgan & Shonkwiler, *supra* note 118, at 5.

123. Neuberger v. City of Portland, 288 Or. 155, 603 P.2d 771 (1979).

124. T. PELHAM, *supra* note 120, at ch. 7.

125. *Id.*

126. 3 LCDC 139 (1979), *appeal dismissed*; see also Carmel Estates, Inc. v. Land Conservation and Dev. Comm'n, 51 Or. App. 435, 625 P.2d 1367 (1981).

127. OAR 660-15-000 (1975).



using rural agricultural land. The LCDC held that the "exception" was invalid for failure to consider all reasonable alternatives, i.e., sites within Sandy and the Gresham urban growth boundaries, sites otherwise suitable even if not currently zoned for that use, and smaller sites which separately are able to accommodate the types of retail uses found in a shopping center (supermarket, office space, hardware, etc.).

A recent case on Goal 2, Land Use Planning, involved an attempt to get an exception for industrial uses on agricultural lands. In *Eugene v. Lane County*,<sup>128</sup> the Land Use Board of Appeal held that "at a minimum, there must be a showing that the industrial activity proposed is significantly dependent upon a unique site specific resource located in the subject area."<sup>129</sup>

Goal 10, Housing, requires cities and counties to provide for the housing needs of citizens of the state. LCDC has interpreted Goal 10 to incorporate the principles of "fair share" and "least cost" housing.<sup>130</sup> In *Stout v. Multnamah County*,<sup>131</sup> the LCDC upheld a county ordinance which did not allow mobile homes outright in one or more zones. Although Goal 10 requires localities to allow adequate numbers of affordable housing types outright, local governments may select the means for achieving this. Multnamah County had provided for a variety of multifamily housing types instead of mobile homes.

#### H. Texas

Long the country's premier example of both "no zoning" (Houston)<sup>132</sup> and "no planning," there is evidence that both may soon change. Houston adopted a set-back ordinance in mid-1982, ostensibly to ward off zoning itself.<sup>133</sup> Moreover, in *City of Pharr v. Tippitt*,<sup>134</sup> the Texas Supreme Court sent out a plea for more attention to an expression of standards in land use decision-making that both city officials and the courts can understand. Finally, in a recent paper, Texas Supreme Court Justice Jack Pope suggests an adopted comprehensive plan should provide these standards. Several excerpts suggest a basis for major planning law changes in Texas:

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128. LUBA 80-050 (1981).

129. *Id.*

130. *Seaman v. City of Durham*, LCDC (No. 77-025) (1978).

131. LCDC (No. 79-037) (1981).

132. Siegan, *Non-Zoning in Houston*, 13 J. LAW & ECON. 75 (1970).

133. 10 LAND USE PLANNING REP. 209, 213 (1982).

134. 616 S.W.2d 173 (Tex. 1981).

Good city planning, therefore, should precede the act of zoning. This is so because it was originally legally intended that zoning should be "in accordance with a comprehensive plan." It also makes sense that the skills in planning would produce a better zoning product. There is, however, a much better reason that the city plan should be carefully developed, studied, debated, approved either formally or informally, and promulgated even though the planning work will continually proceed. . . .

A proposed change in zoning should focus upon the city plan and how and why the plan historically arrived at its present formulation. Those resisting the rezoning should be able to invoke the declared and inherent reasons for the present plan.<sup>135</sup>

Justice Pope would only give credibility to comprehensive plans that reflect a legitimate attempt to address the present and future needs of a city. He lists factors he would use as a judge in evaluating a particular plan: (1) Does the plan constitute a clear and definite statement of policy? (2) Is the plan long-range? (3) Is the plan comprehensive? (4) Is the plan general? (5) Is the plan a product of public debate? (6) Is the plan implemented by the council? (7) Is the plan amendable?<sup>136</sup>

### I. Washington

Washington continues to be a "plan as advisory guide" state. The Supreme Court of Washington in *Cathcart-Maltby-Clearview, etc. v. Snohomish County*,<sup>137</sup> rejected the argument that rezonings must substantially comply with the existing comprehensive plans. The court reiterated its position that the plan is only a general blueprint and thus only general conformance is necessary. However, in this case the court concluded that the master plan and zoning agreements did dovetail with the proposed development plan.

In *West Hill Citizens, etc. v. King County Council*,<sup>138</sup> the court of appeals was faced with the approval of a preliminary plat with density consistent with applicable zoning ordinances, but which exceeded restrictions in the community plan. West Hill contended that the more restrictive plan controls densities. The developer and King County argued that zoning takes precedence over an inconsistent comprehensive plan. The court used the following language in the planning enabling act to reject plan supremacy:

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135. *The Decisionmaking Process by the City and the Courts* will be published in the 1982 Proceedings of the Institute on Planning, Zoning and Eminent Domain (Southwestern Legal Foundation).

136. *Id.*

137. 96 Wash. 2d 201, 634 P.2d 853 (1981).

138. 29 Wash. App. 168, 627 P.2d 1002 (1981).

[I]n no case shall the comprehensive plan, whether in its entirety or area by area or subject by subject be considered to be other than in such form as to serve as a guide to the later development and adoption of official control. . . .

[T]he principle case upon which West Hill relies is *Baker v. Milwaukee*, 271 Or. 500, 533 P.2d 772 (1975), which held that a comprehensive plan controlled over a prior conflicting zoning ordinance. . . . However, the Washington Supreme Court, without specifically naming *Baker*, has clearly rejected its rationale, stating that "Oregon's statutory scheme substantially differs from Washington's."<sup>139</sup>

"Consistency" mandates, which make the plan the law, are forcing a creative dialogue between planners and lawyers as they invent or reinvent local comprehensive plans. However, if the plan as law reform movement is to make substantial forward progress, we must begin to shift urban planning into a more effective transitional stage, particularly as it relates to the function of "plan-making."

## VI. Growth Management<sup>140</sup>

While not so trendy a topic as in the 1970s when the likes of *Golden v. Planning Board of Ramapo*<sup>141</sup> and *Construction Industry Association v. City of Petaluma*<sup>142</sup> were decided, growth management continues to be a critical issue in many states. Among the most active are California, Florida, and Colorado, where population in the past decade has boomed.

### A. California

In 1978, a major blow was dealt to the financial resources of state and local governmental agencies when Proposition 13 was approved by the voters. This amendment to the state constitution severely restricted use of property taxes to finance expansion of local government and required voter approval of new forms of taxation. During the following two years, a major growth revolt occurred throughout the state which resulted in the enactment of numerous growth management plans by city and county governments, as well as by the initiative process.<sup>143</sup>

139. 627 P.2d 1002, 1004-05 (Wash. App. 1981).

140. Materials from this section come primarily from Subcommittee Chairman David Anderson of Santa Barbara, California.

141. 30 N.Y.2d 359, 285 N.E.2d 291 (1972).

142. 522 F.2d 897 (9th Cir. 1975), *cert. denied* 424 U.S. 934 (1976).

143. Examples of growth management by ordinance is City of Napa and growth management by initiative is City of Thousand Oaks.

A very good summary of this growth management explosion is contained in the

The reaction to this movement came in 1980 when the building industry and other concerned groups convinced the state legislature that growth controls were preventing any reasonable response to the need for "affordable" housing to meet the needs of new arrivals and persons in the low- and moderate-income levels. The legislature responded by enacting several new laws which attempt to restrict the ability of local communities to limit growth. The most important new legislation is found in the Government Code which provides:

If a county or city, including a charter city, adopts or amends a mandatory general plan element which operates to limit the number of housing units which may be constructed on an annual basis, such adoption or amendment shall contain findings which justify reducing the housing opportunities of the region. The findings shall include all of the following:

- (a) A description of the city's or county's appropriate share of the regional need for housing.
- (b) A description of the specific housing programs and activities being undertaken by the local jurisdiction to fulfill the requirements of subdivision (c) of Section 65302 [the mandatory housing element requirements of general plan legislation].
- (c) A description of how the public health, safety, and welfare would be promoted by such adoption or amendment.
- (d) The fiscal and environmental resources available to the local jurisdiction.<sup>144</sup>

Other restrictions on growth management techniques were adopted as part of the 1980 General Plan and Subdivision Map Act amendments, and generally require that local communities plan for and accommodate their "fair share" of regional growth and housing needs.<sup>145</sup>

The issue of impact fees has also been a major issue in California. State legislation in California authorizes cities and counties to require dedication of land or payment of in lieu fees by subdividers for parks and recreational facilities<sup>146</sup> and school facilities;<sup>147</sup> reservations of land within a subdivision for future parks, recreational facilities, fire stations, libraries or other public uses;<sup>148</sup> land dedications for streets, bus turnouts, and bicycle paths;<sup>149</sup> fees for con-

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report entitled, *The Growth Revolt: AfterShock of Proposition 13?* (August 1980) (available from the State Office of Planning and Research, 1400 Tenth Street, Sacramento, Cal. 95814).

144. CAL. GOV'T CODE § 65302.8 (West 1966 & Supp. 1981).

145. See CAL. GOV'T CODE, §§ 65863.6, 66412.2, 65580-65913.2, 65915 (West 1966 & Supp. 1981).

146. *Id.* at § 66477.

147. *Id.* at § 65970.

148. *Id.* at § 66479.

149. *Id.* at § 66475.

struction of drainage channels, sanitary sewer facilities, ground water recharge basins, bridges and major thoroughfares;<sup>150</sup> and dedications of solar access easements.<sup>151</sup> The use of impact fees and land dedication requirements have been upheld by California courts as valid uses of the police power and not "special taxes" under the Proposition 13 restrictions.<sup>152</sup>

### B. *Florida*<sup>153</sup>

With the burgeoning growth throughout south and central Florida, intense pressures have been placed on the financial capacity of local governmental units to provide services to new residents. Strongest pressures have been placed on the provision of water and sewage facilities, schools, parks and roads. One mechanism a number of local governments have turned to, or at least are contemplating in order to ameliorate these financial burdens is the impact fee. Similar to the mandatory dedication or in lieu fee requirements found in some plat ordinances, the impact fee ordinances being adopted in Florida constitute charges exacted against new development in order to generate revenue for new capital facilities demanded by that new development.

This local government activity has generated a fair amount of litigation, for even though the Florida Supreme Court upheld the concept of impact fees for water and sewage facilities,<sup>154</sup> there have been no definitive appellate court decisions after *Dunedin* addressing the legal viability of impact fees for roads, parks, school, and other government services. It does, however, appear such decisions will be forthcoming.

One case that has now made its way to the Fourth District Court of Appeals, *Hollywood, Inc. v. Broward County*,<sup>155</sup> challenges the Broward County park impact fee provision. The ordinance, which was upheld by the circuit court in *Broward County*, has been appealed by the plaintiff. The appellate briefs have just been filed, and a decision is at least several months away.

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150. *Id.* at § 66483.

151. *Id.* at § 66475.3.

152. See *Trent Meredith, Inc. v. City of Oxnard*, 114 Cal. App. 3d 317, 170 Cal. Rptr. 658 (1981); *Mills v. County of Trinity*, 108 Cal. App. 3d 656, 166 Cal. Rptr. 674 (1980).

153. This section is taken nearly verbatim from material submitted by F. Craig Richardson of Boca Raton.

154. *Contractors & Builders Ass'n v. City of Dunedin*, 329 So. 2d 314 (1976).

155. Case No. 81-700.

Another case that could make it into the appellate courts is *Homebuilders & Contractors Association v. Palm Beach County*,<sup>156</sup> which challenges the Palm Beach County road impact fee ordinance. The court upheld the road impact fee ordinance. The decision has been appealed.

Because of the growing interest among local governments in Florida with the concept, it would not be surprising to see other cases emerging in the near future.

### C. Colorado

Concerned about accelerated growth's effect on water supply and wastewater disposal facilities, the Denver suburb of Westminster adopted a growth management program which tied development to available water and sewer service and "rationed" tap-ons and connections to the area's developers.<sup>157</sup> The program was challenged by a developer whose predecessor had some contractual arrangements with the city for water and sewer connections exceeding those allowed under the new program. The city's plan was upheld,<sup>158</sup> on the ground that the city was under no obligation to provide water and sewer service in any particular quantity or at any set date.

## VII. Development Rights<sup>159</sup>

### A. Introduction

Since the pioneering work of John Costonis ten years ago,<sup>160</sup> "transfer of development rights" (TDRs) has enjoyed considerable vogue as a potentially creative tool in managing the use of land. TDRs have been touted as the answer to preserving historic

156. Case No. 79-3281 CA (L) 01.

157. Kelly, *Comment on Westminster Growth Control Cases*, 34 LAND USE L. & ZONING DIG. 15 (March 1982).

158. *Colorado Inv. Servs., Inc. v. City of Westminster*, 636 P.2d 1316 (Colo. App. 1981).

159. This section is taken from materials submitted by Professor Richard D. Lee of Temple Law School, with able assistance from Professor Linda Bozung of Pepperdine. It appears here in a reduced form, much of it in the language of the authors.

160. Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972), followed by Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973), and culminating in J. COSTONIS, *SPACE ADRIFT, LANDMARK PRESERVATION AND THE MARKETPLACE* (1974); see also ROSE, *A Proposal for the Separation and Marketability of Development Rights as a Technique to Preserve Open Space*, 2 REAL EST. L.J. 635 (1974).

landmarks, guarding valuable farmland from encroaching development, maintaining open space, and protecting environmentally sensitive acreage.

Early litigation in New York added to the euphoria. Chief Judge Breitel, for the New York Court of Appeals, in *Fred F. French Investment Co. v. City of New York*,<sup>161</sup> first recognized that development rights are a component of the value of the underlying property and hence potentially valuable as a transferable commodity. This determination came, however, in a decision which upheld the lower court's ruling declaring that TDRs did not provide sufficient compensation for the rezoning of residential and office building development property as public parks. The decision was based on the dual grounds that: (1) no certain market existed for the "floating" development rights, and therefore a deprivation of economic value was effected; and (2) no reasonable use remained for the property now zoned as a public park and therefore a confiscation was effected. Chief Judge Breitel quickly adopted a more favorable stance toward TDRs in *Penn Central Transportation Co. v. City of New York*,<sup>162</sup> in which he ruled that TDRs could provide reasonable compensation for the forced relinquishment of development rights on a landmark site.

Planners, undaunted by these legal distinctions, were overjoyed when the United States Supreme Court "approved" TDRs in affirming Chief Judge Breitel in *Penn Central Transportation Co. v. City of New York*.<sup>163</sup> Actually, the Supreme Court merely held that the New York Court of Appeals had found that the development rights were valuable and hence could be included in the computation to determine whether the landowner had any remaining reasonable use for his property.<sup>164</sup> Thus the New York case law has set many of the legal standards by which TDRs are judged. However, there are not many recent appellate cases which deal directly with TDRs.

#### 1. PENNSYLVANIA

*In re Buckingham Developers, Inc.*,<sup>165</sup> involved an appeal of an owner of farmland from a denial of a zoning variance to develop

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161. 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976).

162. 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977).

163. 438 U.S. 104 (1978).

164. *Id.* at 137. For more on the New York case law, see *Modjeska Sign Studios, Inc. v. Berle*, 43 N.Y.2d 468, 373 N.E.2d 255, 402 N.Y.S.2d 359 (1977), *appeal dismissed*, 439 U.S. 809 (1978) (distinguishing *French* from *Penn Central*).

165. 433 A.2d 931 (Pa. Commw. Ct. 1981).

the land in a particular way. Under the local zoning ordinance, TDRs were attached to the farmland. As one of several arguments, the landowner asserted that the township could not deny the variance sought on the theory that sale of the TDRs was an alternative to developing the land. The court characterized the theory as "novel" and wisely chose not to address it.

## 2. WASHINGTON

*Louthan v. King County*<sup>166</sup> dealt with two suits seeking to block the sale of general obligation bonds, the proceeds of which were to be used to purchase development rights to certain property, notably farmland, if the rights were voluntarily put up for sale. One plaintiff argued that the TDR plan was unnecessary because of the substantial success of ongoing county efforts to preserve farmland and open space. This being so, the use of bond money to purchase TDRs was a gift of public funds contrary to the Washington Constitution. The court disagreed, holding the TDRs were a valuable property right which would serve as proper consideration for the expenditure of state funds.

### B. *Local and Regional Ordinances*

The passage of TDR ordinances, however, continues. Two California jurisdiction ordinances are set out at some length, providing as they do useful—and rare—insights on the complicated mechanics of TDR.

## 1. CALIFORNIA

a. *Malibu-Santa Monica*. California Coastal Commission, South Coast Region, has recently adopted Regional Interpretive Guidelines for the Malibu-Santa Monica Mountains area (June 18, 1981) that contain provisions for a transfer development credit program. These credits are to be used "as a method of mitigating the adverse cumulative effects of new land divisions" in the coastal zone. The Malibu-Santa Monica Mountains transfer development credit program was heralded as one of, if not the, first transfer development rights scheme adopted in California.

Under the California Coastal Act of 1976,<sup>167</sup> cities and counties were directed to formulate and adopt Local Coastal Programs (LCP) to direct city and county development according to the dictates of the Act. In the period of the formulation of the LCPs,

166. 94 Wash. 2d 422, 617 P.2d 977 (1980).

167. CAL. Gov'T CODE §831.5 (West 1966 & Supp. 1982).



prior to their passage, the state commission retains permanent control over development of the coastal areas and must issue guidelines to facilitate that process for local governments and the State and Regional Commissions. Basically, the task of formulating the necessary guidelines has been assigned to the Regional Commissions.

The South Coast Regional Commission thus adopted Regional Interim Guidelines that include a Transfer Development Credit Program for the Santa Monica Mountains Region. The objective of this scheme is to insure that construction in the interim period prior to the approval of the LCP takes place only in those areas that are able to support increased development on the basis of accessibility of services, proximity to local employment centers, and minimal destruction to coastal resources. The program specifies special donor and receiver sites. Although construction is not totally precluded on the donor sites, it is restricted to such an extent as to be uneconomical in most instances. Thus the "voluntary" program is rendered somewhat involuntary in those cases where it is not financially possible for a landowner to leave the property undeveloped until the point in time when the LCP is completed. In that instance, the owner will find it advantageous to sell his development credit to a receiver to gain compensation.

The receiver must collect one right for each parcel that is created through subdivision of an existing parcel and only conditional approval of development is awarded until the "receiver owner" has purchased the requisite amount of development credits. At that point, the owner of the donor parcel must record an offer to dedicate an Open Space or Scenic Easement over the subject lots in favor of a public agency or private association approved by the executive director of the commission. Although this recordation does not sanction use of the property by the public, it does serve to allow enforcement of the agreement to extinguish all development potential. Uses of the property such as corrals, patios, or decks are allowed if ancillary to another parcel that was not used to create a development credit. The offer of dedication must be irrevocable for twenty-one years.

Trade of the rights can only occur between a donor and receiver that are both located within one of three designated zones. It is believed that requiring exchanges to take place in geographic proximity to one another minimizes the effects of development of the nearby donor regions in the same zone. Receiver parcels are usually located in already developed areas and approval of the

transfer credit will be contingent upon the satisfaction of three conditions: the proposal and land division (1) must satisfy current county zoning and map requirements; (2) must not require the extension of roads or water services into rural areas; and (3) if not within an existing developed area or approved expansion, the parcels to be created must be no smaller than the average size of all parcels lying wholly or partially within one-fourth mile of the subject property.

The guidelines direct that the exchange of credit should take place through the open market although the California Coastal Conservancy and the Santa Monica Mountains Conservancy have been involved in the buying and selling of credits to a limited extent.

b. *Transfer Development Rights Program: Tahoe Regional Planning Agency.* The Tahoe Regional Planning Agency (TRPA) also instituted a Transfer Development Rights (TDR) Program in recognition that there was a need to provide some form of compensation for owners of parcels of property determined "unbuildable" under the Section 208 Water Quality Plan. Although direct purchase of lots "retired" from development was possible, TRPA believed that formulation of the TDR Program would provide a more effective means of mitigating the economic consequences to property owners that would occur as a result of the plan.

The intense pressure for development on the California side necessitated formulation of a rather rigid development criteria structure. Lots are numbered one through seven (1-7) according to their "buildability quotient," i.e., parcels numbered 1-3 are considered high hazard and deemed not suitable for development due to their location in stream beds or erosion areas. Construction is permitted on lots numbered 4-7 with specific variations in permitted ground coverage (maximal allowable coverage 30 percent).

Rights are distributed through a random allocation process (lottery). Although all landowners may take part in the allocation process, building is allowed only on those high capability lots (4-7) and owners of high hazard lots (1-3) that draw building permits must become TDR "suppliers." While the right to construct represented by the permit may be relinquished to TRPA by the landowners, in the hope that the 1983 plan may permit construction on the high hazard lot, the customary disposal system for the permit will be through the TDR program. A 4-7 lot (buildable) is the receiver parcel for the development right gained through the allocation process by lots numbered 1-3 (unbuildable). Upon

transfer of the permit, owners of property in the 1-3 classification must simultaneously relinquish all development rights to the land either by deeding title to a nonprofit agency or by granting to the city or county a permanent open space easement in the land. Such an easement, while it does not place the land in the public domain, guarantees that the land will forever remain, as open space (the landowner retains limited uses such as camping).

This simultaneous relinquishment of all development rights by the landowner to a public entity is an extremely critical element of the TDR program, since the uncertain nature of zoning has in the past often discouraged whole-hearted participation in such a program by individuals who fear that later pressures on the governmental body might force modification of present zoning restrictions that would thus diminish the value of the right received (for the buyer) or the compensation gained (for the seller). By requiring the grant of title or an easement, development is restricted permanently irrespective of later zoning decisions by the legislative body. TRPA has, through this restriction, communicated to the landowner that it is serious about enforcing and preserving the present requirements.

Each TDR ordinance (there are three: City of Lake Tahoe-El Dorado County, Placer County, and the California Tahoe Regional Planning Agency) requires that building must occur within three years after the purchase of the TDR. Construction may be single family only due to restrictions on sewage and water capacity.

## 2. NEW JERSEY

The Development Ordinance of Chesterfield Township<sup>168</sup> allows more intensive cluster development on parcels of at least 25 acres by the simple device of having the developer deed other land (can be noncontiguous to the township for open space, recreation, school sites, agricultural, or other public use) or in the alternative restrict by deed the other land to agricultural use in perpetuity. However, since all land is treated as similar, the poorest land has been offered for credit, rather than good agricultural land.

## 3. MARYLAND

a. *Montgomery County*. A series of 1981 articles in the *Washington Post*<sup>169</sup> spotlight some of the problems facing this county's TDR

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168. N.J. REV. STAT. § 146 (West 1967 & Supp. 1982).

169. Maryland Weekly Section, Jan. 8, 1981, at 1; Maryland Weekly Section, Mar. 5, 1981, at 1; Maryland Weekly Section, Mar. 12, 1981, at 1; Maryland Weekly Section, Aug. 13, 1981, at 2.

ordinance. Local groups have opposed their areas being designated as receiving areas for TDRs from farmland elsewhere in the county. Other groups are concerned that TDR sales will only delay, not prevent, farmland development because the county council is free to change its position in a few years. Some farmers have gone to court to challenge, as an unconstitutional taking of their property without just compensation, the designation of receiving areas for only 15,000 of the 88,000 acres in TDR sending areas. A Development Rights Bank was proposed, but has yet to be established. This bank would make loans against TDR collateral, or, in certain cases, purchase TDRs directly. The county also proposed to establish a development rights acquisition fund to guarantee bank loans to developers who buy TDRs and also to buy TDRs directly from farmers for eventual resale. This fund also has not yet been established.

### VIII. Interim Zoning and Moratoria<sup>170</sup>

The conflict between the use of the police power and the freedom of the land owner to use real property to its highest and best use or any other desired use arises most often in the context of pressure for change. Viewing the evolution of the law on this facet of zoning regulation, questions of validity of governmental effort to stem the flow of new development pending deliberations about proposed new zoning constraints appear today to be decided by the application of the same legal techniques and concepts as were used fifty years ago.<sup>171</sup>

When dealing with this subject various terms should be defined to provide a common point of departure:

*Interim Zoning:* Regulation in the form of ordinance or resolution placing property in a zoning classification under which its use is discouraged, or such that its permitted uses would not be incompatible with new proposals contained in the zoning ordinance under consideration, or which would permit no form of development which would be incompatible with the zoning ordinance under consideration.

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170. Materials for this report were submitted by Subcommittee Chairman and Member of Section Council Robert Greenbaum of New Jersey.

171. *Miller v. Board of Pub. Wks.*, 195 Cal. 477, 234 P. 381 (1925) (necessity to prevent harm to the environment), *appeal dismissed*, 273 U.S. 781 (1927); *Fowler v. Obier*, 224 Ky. 742, 7 S.W.2d 219 (1928) (accepted as an initial unit of a comprehensive plan).

*Stopgap Zoning*: Regulation which freezes the right to use land to those uses presently permitted for the duration of the period established by the regulation. At times, however, the term "stopgap zoning" is used in a sense synonymous with "interim zoning."

*Moratorium*: Regulation more frequently related to a halt or freeze in the permit process but used to describe ordinances or resolutions which bar all use approvals for the time period established in the regulation.<sup>172</sup>

These definitions are an attempt to bring some rationality and consistency to an area where courts have come to wildly disparate results. This sense of chaos pervades the cases from jurisdiction to jurisdiction and at times there can be no reconciling cases within the same jurisdiction.<sup>173</sup> Courts do not agree on the definitions given. Therefore, every case must be carefully reviewed since the labels are virtually meaningless. Results do not often depend on definitions.

The reports of recent litigation in the never ending tension between developer and regulatory authority bring an unmistakable air of *deja vu*. Interim regulation adopted without authority of specific enabling legislation may, depending upon happenstance of forum, have opposite results.<sup>174</sup>

A typical judicial approach is that of an appellate court in New Jersey when responding to an argument that sought to strike a regulation characterized as a moratorium while distinguishing such

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172. A. RATHKOPF, *THE LAW OF ZONING AND PLANNING*, § 11.01 (4th ed. 1981).

173. *Almquist v. Town of Marshan*, 308 Minn. 52, 245 N.W.2d 819 (1976); *Ostrand v. Village of North St. Paul*, 275 Minn. 440, 147 N.W.2d 571 (1966); *Deal Gardens, Inc. v. Board of Trustees*, 48 N.J. 492, 226 A.2d 607 (1967); *Board of Supervisors v. Horne*, 216 Va. 113, 215 S.E.2d 453 (1975); *Bennett T. Matthews v. Board of Zoning Appeals*, 218 Va. 270, 237 S.E.2d 128 (1977); *State ex rel. Randall v. Snohomish County*, 488 P.2d 511 (Wash. Sup. 1971); *Smith v. Skagit County*, 453 P.2d 832 (Wash. Sup. 1969); *Schrader v. Guilford Planning & Zoning Comm'n*, 418 A.2d 93 (Conn. 1980).

The research path followed a predictable route with valuable reference having been made to the following sources which are commended to any colleague with interest in the law on this subject: A. RATHKOPF *supra* note 172; N. WILLIAMS, *AMERICAN LAND PLANNING LAW* (1974, with Cumulative Supplement 1981); 82 Am. Jr. 2d, paragraph 72-74; Annot., 30 A.L.R. 3d 1190.

174. Thus, regulation was upheld as being within the scope of implied power in general enabling legislation notwithstanding the absence of express statutory authority, *Collura v. Town of Arlington ex rel.* 367 Mass. 881 (Sup. Jud. Ct. 1975), while similar regulation was held to be void because it was not within the scope of enabling legislation. *State ex rel. Holiday Park, Inc. v. City of Columbia*, 479 S.W.2d 422 (Mo. 1972).

regulation from interim or stopgap zoning which had earlier been upheld:

Plaintiff argues that these cases involved "interim" or "stop gap" zoning and not a moratorium. While this is true, we believe that the distinction is without legal difference. It is clear that the purpose of interim zoning, as approved by our courts, is to halt development in certain uses temporarily until enactment of a new comprehensive zoning ordinance. That is precisely the purpose of the enactment challenged here and the power to promulgate such a temporary measure is "within the intent and purpose of the statutes relating to planning."<sup>175</sup>

Perhaps the case most illustrative of the quandry and the rationale of solution is *Almquist v. Town of Marshan*.<sup>176</sup> There, plaintiff-property owner sought to develop lots from a portion of his farm acreage as was at the time permitted under the township zoning regulations. After substantial delay the authorities did not act on plaintiff's application but instead introduced a moratorium ordinance of six months duration. The Minnesota zoning enabling statute contained no express authority for this action, although legislation applicable to counties did so. In upholding the regulation the court laid down criteria for the validity of a moratorium which it held was within the implied powers of the local authorities under the general enabling statute. The specific holding was that a moratorium on the issuance of permits (and presumably on property uses otherwise permitted by ordinance) is valid if (a) it is adopted in good faith; (b) it is not discriminatory; (c) it is of limited duration; (d) it has for its purpose the development of a comprehensive plan; and (e) the town board acts promptly to adopt such plan.

Of course, the difficulty with *Almquist* is that in each case the applicant is relegated to a trial of an issue of fact with respect to each of the court's stated criteria for the validity of a moratorium. Query: whether public policy is better served by a statute clearly branding unacceptable a moratorium on development but permitting a "reasonable interim zoning ordinance" with suitable constraints as to time and requirement of parallel action toward new or substantially revised regulations.<sup>177</sup>

Unlike the dynamic and burgeoning area of zoning law generally, the question of interim zoning and moratoria does not appear

175. *New Jersey Shore Builders Ass'n v. Township of Ocean*, 128 N.J. Super. 135, 319 A.2d 255 (1974). This, of course, preceded adoption of New Jersey's Municipal Land Use Law, *infra* note 177.

176. 245 N.W.2d 819 (Minn. 1976).

177. New Jersey Municipal Land Use Law, Ch. 291, Laws of N.J. 1975, as amended § 77 (N.J. STAT. ANN. § 49:55D-90 (West 1970 & Supp. 1982)) is verbatim:

far advanced today beyond the concepts initially articulated in the earlier cases which appear in the treatises cited in this report. There has, however, been a steady growth in the body of statutory enactments where through enabling legislation or other statutory enactments the courts have received guidance from the legislatures.<sup>178</sup>

Interim zoning, then, is to be tested on the same basis as all zoning regulations, i.e., (a) authority, either expressed or implied; and (b) validity, either on the basis of compliance with technical requirements for enactment or on the basis of general constitutional principles of substantive due process and equal protection.

## IX. Transportation and Land Use:

### Zoning for Mass Transit in Atlanta

On January 1, 1982, a new zoning ordinance became effective for the City of Atlanta, Georgia,<sup>179</sup> which significantly restructured the

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C. 40:55D-90 Moratoriums; interim zoning.

a. The prohibition of development in order to prepare a master plan and development regulations is prohibited.

b. A municipality may adopt a reasonable interim zoning ordinance not related to the land use plan element of the municipal master plan without special vote as required pursuant to subsection 49 a. (C. 40:55D-62a.) of this act, pending the adoption of a new or substantially revised master plan or new or substantially revised development regulations. Such interim zoning ordinance shall not be valid for a period longer than one year unless extended by ordinance for a period no longer than an additional year for good cause and upon the exercise of diligence in the preparation of a master plan, development regulations or substantial revisions thereto, as the case may be: . . . .

178. This compilation is made from notes and text in A. RATHKOPF, *supra* note 172, and N. WILLIAMS, *supra* note 173, and as reported by colleagues on the Subcommittee:

California—CAL. GOV'T CODE § 65858 (West 1966 & Supp. 1981).

Colorado—COLO. REV. STAT. ANN. § 106-2-20 (1973).

Kentucky—1979 KY. REV. STAT. & R. SERV. 100-350(9) (Baldwin 1977).

Michigan—MICH. STAT. ANN. § 5.2963(15) (Callaghan 1976 & Supp. 1982).

Minnesota—MINN. STAT. ANN. § 394.34 (West 1968 & Supp. 1982).

New Jersey—N.J. STAT. ANN. § 40:55D-90 (West 1967 & Supp. 1982).

North Dakota—No Citation.

Oregon—OR. REV. STAT. § 215.104 (1955).

South Dakota—S.D. CODIFIED LAWS ANN. §§ 11-2-10, 11-4-3.1 (1967 Supp. 1981).

Utah—No Citation.

Vermont—VT. STAT. ANN. tit. 24, § 4410 (1975 & Supp. 1981).

Virginia—No Citation.

Washington—WASH. REV. CODE § 36-70-790 (1964 & Supp. 1982).

Wisconsin—WIS. STAT. ANN. § 62.23(7b) (West 1957 & Supp. 1982).

Wyoming—WYO. STAT. § 18-5-20 (1977).

179. This section is written from a report supplied by Jay J. Levin of Atlanta, and appears here in lightly edited form.

public policies and controls for development of the central business district of downtown Atlanta.<sup>180</sup>

The 1982 Zoning Ordinance marks a significant departure from existing laws in three essential areas: (a) the utilization of Floor Area Ratios (FAR)<sup>181</sup> and Land Use Intensity formulae (LUI)<sup>182</sup> as basic development criteria; (b) the adoption of strict parking limitations; and (c) the recognition of, and actual creation of, Special Public Interest Districts.<sup>183</sup> A major factor in the new approaches contained in the 1982 Zoning Ordinance was the systematic attempt to focus future development around major rail rapid transit stations and facilities which were under construction and which first opened for passenger service in 1978.

Created by statute and implemented and funded as a joint public instrumentality of local governments by intergovernmental contract in 1971,<sup>184</sup> Metropolitan Atlanta Rapid Transit Authority (MARTA) has designed and constructed nine rail rapid transit stations within or adjacent to the central business district of downtown Atlanta.<sup>185</sup> Three of these stations opened for passenger

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180. City of Atlanta Zoning Ordinance, Art. 16 (adopted December 15, 1980; effective January 1, 1982) [hereinafter referred to as 1982 Zoning Ordinance].

181. The 1982 Zoning Ordinance defines the Floor Area Ratio as follows:

The sum of the gross horizontal area of the several floors of a building measured from the exterior faces of the exterior walls or from the centerline of walls separating two buildings, but not including attic space with headroom of less than seven (7) feet, floor area six (6) feet or more below grade, uncovered steps or fire escapes, accessory water or cooling towers, or accessory off-street parking or loading areas.

Atlanta 1982 Zoning Ordinance, *supra* note 180, § 16-29.001 (13).

182. A Land Use Intensity (LUI) system has been defined by Research Atlanta, an independent nonprofit public policy organization, as a "method for regulating multi-family dwelling development by density (FAR) and the provision of open space rather than the [traditional] method of specifying the maximum number of units per acre." See RESEARCH ATLANTA, ATLANTA'S PROPOSED ZONING ORDINANCE: AN ANALYSIS (1978) [hereinafter cited as RESEARCH ATLANTA ZONING STUDY]. The Land Use Intensity Ratios are set forth as Table I in § 16-08.007 of the Atlanta Zoning Ordinance.

183. See 1982 Zoning Ordinance, *supra* note 180, ch. 18, 18A, 18B, 18C and 18D.

184. MARTA was created by the Georgia General Assembly in 1965, 1965 GA. LAWS, § 2243, as amended, following the enabling authorization of a local constitutional amendment. GA. CONST. 1945, art. XVII, § I, para. I-V, as continued in force by virtue of GA. CONST. 1976, art. XIII, § I, para. II. A Rapid Transit Contract and Assistance Agreement was entered into, as of September 1, 1971, by MARTA, the City of Atlanta, and Fulton, DeKalb, Clayton, and Gwinnett Counties. In accordance with referenda requirements, this Contract became binding upon only MARTA, the City of Atlanta, and Fulton and DeKalb Counties.

185. These nine transit stations consist of the Five Points Station (the hub station), the Omni and Georgia State Stations on the East-West line, and the



service in 1978, and three additional stations opened in 1981. The remaining three stations are scheduled to open for revenue service in late 1982.

Commencing with the very first drafts of the 1982 Zoning Ordinance which were prepared in 1974, a fundamental decision was made to tailor the new zoning requirements to the anticipated impact of these rail rapid transit stations on area development. Such potential impact was carefully considered in two separate studies: (a) a Comprehensive Development Plan of the City of Atlanta,<sup>186</sup> and (b) Transit Station Area Development Studies (TSADS).<sup>187</sup> Comprehensive transportation planning for metropolitan Atlanta was also mandated by federal regulations and by the Georgia General Assembly and is embodied in the *Regional Transportation Plan 1978-2000*.<sup>188</sup> The 1982 Zoning Ordinance was intended to facilitate and implement the development goals and guidelines set forth in the Comprehensive Development Plan, and was based in large part on the express assumption that areas adjacent to rapid transit stations would be among the most desirable development locations in the City of Atlanta.<sup>189</sup>

The 1982 Zoning Ordinance addresses the potential impact of rapid transit stations on area development by authorizing and specifically creating four special public interest districts around key MARTA stations. The intent for these districts, as expressed in the 1982 Zoning Ordinance, is to permit creation of such districts:

- (a) in general areas officially designated as having special and substantial public interest in protection of existing or proposed character, or of principal views of, from, or through such areas;
- (b) surrounding individual buildings or grounds where there is special and substantial public interest in protecting such buildings and their visual environment; or

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Garnett, Peachtree Center, Civic Center, North Avenue, Midtown, and Arts Center Station on the North-South line.

186. Prepared by the Mayor and adopted by the City Council in accordance with Atlanta City Charter Section 3-061, Comprehensive Development Plans have been adopted by City of Atlanta on an annual basis since 1975.

187. Transit Station Area Development Studies were prepared for each proposed MARTA station during the period from 1972-1975 by the Atlanta Regional Commission.

188. A Regional Development Plan and this Regional Transportation Plan have been prepared by the Atlanta Regional Commission since 1975, with periodic updates.

189. See, e.g., ATLANTA REGIONAL COMM'N, SELECTED VALUE CAPTURE OPPORTUNITIES RELATED TO THE RAPID TRANSIT SYSTEM IN METROPOLITAN ATLANTA (1978); Callies, *A Hypothetical Case: Value Capture/Joint Development Techniques to Reduce the Public Costs of Public Improvements*, 16 URB. L. ANN. 155 (1979).

(c) in other cases where special and substantial public interest requires modification of existing zoning regulations, or repeal and replacement of such regulations, for the accomplishment of special public purposes for which the district was established.

It is further intended that such districts and the regulations established therein shall be in accord with and promote the purposes set forth in the Comprehensive Development Plan and other officially adopted plans of the city in accordance with the Comprehensive Development Plan, and shall encourage land use and development in substantial accord with the physical design set forth therein.<sup>190</sup>

Initial drafts of the 1982 Zoning Ordinance specifically referred to these districts as "MARTA Special Public Interest Districts" and proposed that five such districts be created on the theory that:

There is special and substantial public interest in controlling development within and adjoining MARTA corridors in such a way as to assure appropriate patterns of land use, location and bulk of buildings, intensity of development, provision for open space, protection of public safety, promotion of public convenience, and preservation of desirable characteristics of existing neighborhoods within and adjacent to the corridor.<sup>191</sup>

In response to criticisms and substitute proposals, the final text of the 1982 Zoning Ordinance was revised to reduce the number of such districts to four and to delete the express reference to MARTA Districts by identifying them solely as Special Public Interest Districts.<sup>192</sup> These four Special Public Interest Districts are identified as SPI-1 Central Core District, SPI-2 North Avenue District, SPI-3 Midtown District, and SPI-4 Arts Center District.<sup>193</sup>

Each of these SPI Districts modifies the otherwise applicable development controls in three basic categories: floor area ratio, maximum building coverage limitation, and public space requirements.

In each SPI District, a higher Floor Area Ratio (FAR) is permitted than in the immediately adjacent zoning district.<sup>194</sup>

190. 1982 Zoning Ordinance, *supra* note 180, § 16-18.001.

191. RESEARCH ATLANTA ZONING STUDY, *supra* note 182, at 31.

192. *Id.* at 42-81.

193. 1982 Zoning Ordinance, *supra* note 180, Ch. 18A, 18B, 18C and 18D.

194. FAR Limitations:

C-4 Central Area Commercial-Residential District	(7)	x	(net lot area)
			(nonresidential)
	(3.2)	x	(gross lot area)
			(residential)
C-5 Central Business Support District	(10)	x	(net lot area)
			(nonresidential)
	(3.2)	x	(gross lot area)
			(residential)

To the extent that a much higher FAR is permitted within these districts, the goal is to encourage the development of high intensity housing within multiuse complexes or independent structures adjacent to MARTA stations located in such districts.<sup>195</sup>

Similarly, the maximum building coverage limitations range from a 90 percent of net lot area in SPI-1 to 75 percent of net lot area in SPI-4, while the adjacent areas are restricted to 80-85 percent of net lot area.

The public space requirement which is an added factor in the SPI Districts essentially requires that a certain percentage of the net lot area of nonresidential and mixed use developments be set aside as "spaces appropriately improved for pedestrian amenity or for aesthetic appeal," including areas accessible to the general public such as malls, galleries, atria, lobbies, plazas, terraces and walkways.<sup>196</sup> The public space requirements for the SPI range from 15 percent at SPI-1 to 50 percent at SPI-4.

Since the 1982 Zoning Ordinance has been effective only for a matter of months, the success of the Special Public Interest Districts in achieving the desired goals remains to be seen. Nonetheless, these new regulations are significant for future public controls on development in affirmatively recognizing the relationships between mass transportation facilities and commercial and residential development adjacent to such facilities. By providing incentives for more extensive forms of development proximate to transit stations, the 1982 Zoning Ordinance will serve both to guide the form and location of development within the Central Business District of Atlanta and to foster increased use of mass transporta-

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SPI-1 (Central Core District)	(25) x (net lot area)
	(nonresidential)
	(3.2) x (gross lot area)
	(residential)
SPI-2 (North Avenue District)	(12) x (net lot area)
	(nonresidential)
	(6.4) x (gross lot area)
	(residential)
SPI-3 (Midtown District)	(10) x (net lot area)
	(nonresidential)
	(6.4) x (gross lot area)
	(residential)
SPI-4 (Arts Center District)	(8) x (net lot area)
	(nonresidential)
	(6.4) x (gross lot area)
	(residential)

195. See, e.g., 1982 Zoning Ordinance, *supra* note 180, § 16-18D.002(3).

196. *Id.* at § 16-28.012(2).

tion facilities. While not directly tied to a tax increment or value capture policy,<sup>197</sup> the 1982 Zoning Ordinance will necessarily begin to achieve more directly the benefits of correlating the massive public investments in mass transportation projects with private investments in commercial and multiuse developments.

## X. Housing and Open Space Innovations<sup>198</sup>

One of the principal issues in providing housing for low-income families in developing areas is whether such housing can be made a requirement for the private development of land, much as the provision of infrastructure and open space has become a common prerequisite for residential subdivisions in many parts of the country.<sup>199</sup> The methods of *including* a low-income housing element have been grouped under the inaccurate rubric, "inclusionary zoning."<sup>200</sup> While there is virtually no case law supporting such inclusionary schemes as a *requirement* for land development (indeed, the only state supreme court decision on point struck down such a provision,<sup>201</sup> and most that have been upheld provide incentives and bonuses for such housing increments, rather than make them as a permit requirement), nevertheless a number of communities have commenced work on such inclusionary measures, especially at the local level.<sup>202</sup> What follows is an analysis of two recent programs in California, at least one of which abandons the "bonus" approach and makes the low-income housing element a development condition. Predictably, it has been challenged in court.

### A. Santa Monica, California

Santa Monica, a city of 100,000 people, borders 2.9 miles of Pacific beachfront near Los Angeles. High on the cliffs overlooking the ocean are some of the most expensive homes in the country. Along

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197. See, e.g., *supra* note 189.

198. This section was written in part from materials supplied by Anita Miller, Assistant City Attorney, Albuquerque, New Mexico.

199. Upheld under various theories in California—Associated Homebuilders v. Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971); Illinois—Pioneer Trust & Sav. Bank v. Village of Mt. Prospect, 22 Ill. 2d 375, 176 N.E.2d 799 (1961); New York—Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966).

200. Inaccurate because zoning is rarely involved. For full discussion, see last year's annual report, at 13 URB. LAW. 723, 754-55 (1981).

201. Board of Supervisors v. DeGroff Enters. 198 S.E.2d 600 (Va. 1973).

202. Hawaii, Colorado, California.

the beachfront are high income condominium developments. The city also contains an extraordinarily high number of rental units.

A coalition which supported a successful rent control initiative in 1979 gained control of the Santa Monica City Council in April, 1981, and immediately began to prepare a revised housing element, in keeping with the requirements of California's State Government Code.<sup>203</sup> The new council majority intended to assure that Santa Monica met the existing and projected housing needs of its residents, as well as its fair share of regional responsibility for decent, affordable housing for all social groups. A citizens' advisory committee and a task force, composed largely of supporters of the new council drafted proposals which, in seeking to meet goals of achieving local and regional housing needs, had serious implications for institutional and commercial property owners in the region, and promised to revolutionize land use, planning, and zoning.

First, the council placed a moratorium on all development, pending the drafting of a new housing element and zoning ordinance.<sup>204</sup> Then in June 1981, the citizens' advisory committee, appointed by the new council, released its "proposed housing element" to promote the policy of "inclusionary zoning." It would provide that 30 percent of controlled rental units at each property should be affordable to persons with incomes at or below 120 percent of county median income.<sup>205</sup> To promote the full use of existing housing, the policies, among other things, discourage the withholding of rental units from the rental market, and encouraged the sharing of housing.<sup>206</sup> Other policies encourage conversion of existing housing into limited equity cooperatives and the lease of municipally assisted housing to tenant cooperatives for their operation.<sup>207</sup>

Incentives are created for the development of housing in commercial and manufacturing zones. In all such zones not permitting housing as a matter of right, zoning would be made cumulative to allow housing as a conditional use, which would be allowed unless clearly contrary to public health, safety, and welfare.<sup>208</sup>

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203. CAL. GOV'T CODE, § 65302(C) (West 1954 and Supp. 1981).

204. Interview with Jonathan Horne, Deputy City Attorney, City of Santa Monica (Dec. 15, 1981).

205. Proposed Housing Element, Section 1. Policy Report prepared by the Santa Monica Citizens Advisory Committee for the Revision of the Housing Element, at p. 12 (June 1981).

206. *Id.* at 12-28.

207. *Id.* at 30.

208. *Id.*

In order to maintain and increase the supply of affordable housing, the inclusionary zoning program would apply to *all* market rate housing, whether resulting from new construction, substantial remodeling, or conversion of apartment units. "Market rate" housing is housing affordable only to persons with incomes over 120 percent of the county median. Units were to be provided on site, including sites in commercial and industrial areas.<sup>209</sup> If the city determined that provision of an on-site unit would deter otherwise desirable commercial or industrial development, as in the case of small commercial or industrial projects, off-site units could be provided or an "in lieu" fee could be imposed instead. Furthermore, any market rate housing project which results in the removal of "affordable" units is required to provide for the replacement of such units. Any provision of inclusionary units would be maintained as affordable units through the use of deed restrictions and by regulation.<sup>210</sup>

On August 11, 1981, the city council directed the city attorney to prepare an ordinance lifting the emergency building moratorium and establishing interim permit procedures. Permits can only be granted to developments meeting the inclusionary policies set forth above (with a few exceptions).<sup>211</sup> Developers, property owners, and contractors are currently challenging the *moratorium and interim guidelines* at the district court level.

### B. Monterey, California

On July 8, 1981, the City Council of City of Monterey, California, passed an ordinance<sup>212</sup> in furtherance of a policy to actively promote voluntary private efforts to develop moderate income housing in the community. The city established a policy that all private developers of housing of ten or more units, including division of property for residential purposes, shall contribute to the city housing goal for moderate income housing. In order to encourage developer participation, the city offers incentives, which may include nongeneral fund subsidies, mortgage revenue bonds, waivers of requirements in density increases, or other such incentives.

The ordinance defines moderate income housing as housing affordable to households earning 80 percent to 120 percent of the

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209. *Id.* at 26-48.

210. *Id.* at 26-48.

211. Staff Report, Ordinance Lifting Moratorium and Establishing Interim Permit Procedures (August 25, 1981).

212. Ordinance No. 2416 C.S., City of Monterey (July 21, 1981).

county median income, adjusted for family size. The ordinance assumes that moderate income housing can be rented for 25 percent or less of the family's monthly gross income, or alternatively, purchased with payments of 33 percent or less of the family's monthly gross income. The moderate income housing contemplated includes single family homes, condominiums, apartments, mobile or modular homes, dormitories, or other types which meet relevant city standards. The ordinance defines low income housing as housing affordable to households which earn 0–80 percent of the Monterey County median income, adjusted for family size, as specified in current United States or California census data or other similarly required current data. It is assumed that low income housing can be rented for 25 percent or less of the family's monthly gross income, or alternatively purchased with payments of 33 percent or less of the family's monthly gross income.<sup>213</sup> Developers of ten or more housing units must provide at least 15 percent of their project for moderate income households, or, alternatively, provide an approved developer housing program to the city promoting the city goal that at least 15 percent of all new housing be affordable to moderate income households. That program must contain the proposed technique or combination of techniques to meet the equivalent of the city's moderate income housing goal.<sup>214</sup>

Affordable units must be developed on site unless they are placed elsewhere within the City of Monterey or its sphere of influence. A developer may choose to produce low income housing instead of moderate income housing. In such a case, the city may choose to increase the level of incentives. Furthermore, if a developer provides land or funds in lieu of producing housing, the city or other housing sponsor may choose to use these resources to produce low or moderate income housing.<sup>215</sup>

Prior to obtaining building permits, the developer must assure the city that all housing units in the program will be sold or rented to city certified moderate income households, and that these units will be concurrently constructed with or prior to upper and middle income units in the project, unless this requirement is waived by the city council. The ordinance states that the moderate or low income units need not have the same level of amenities or market

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213. *Id.*

214. *Id.*

215. *Id.*

value as the upper and middle income units at the project, unless specifically required by the city.<sup>216</sup>

The program gives preference for low or moderate income units to persons who live or work within the City of Monterey, but requires that there be no discrimination on the basis of race, creed, or religion. Housing developed for low or moderate income households must continue to be affordable to them from the date of initial occupancy, or it must be replaced by affordable low or moderate income housing elsewhere. The developer must include guarantees that the property will remain low or moderate income housing or be replaced in kind. The ordinance suggests that, in meeting this requirement, the developer use such devices as deed restrictions, wraparound financing, land sales contracts, first right of refusal vested in the city, and other similar devices.

#### XI. Section 1983 and Land Use Control<sup>217</sup>

Building upon last year's report's brief discussion<sup>218</sup> of *Monell v. The Department of Social Services*,<sup>219</sup> *Owen v. City of Independence*<sup>220</sup> and *Maine v. Thiboutot*,<sup>221</sup> this section summarizes leading recent section 1983 cases from the hundreds which have been filed around the country in the past two years which deal with the use of land. Basically, the cases reinforce last year's conclusions that:

1. Purposeful discrimination or knowing or reckless or willful conduct equivalent to purposeful discrimination states a cause of action under section 1983. The cases which fail are those which do not prove that such conduct has occurred.
2. The damages standard, upon successful suit, appears to be that set forth in the Brennan dissent and followed in the *Keene* case.
3. Choice of forum, for a variety of procedural and substantive reasons, remains a major factor for the practicing lawyer.

*Hernandez v. City of Lafayette*<sup>222</sup> is probably the most important

216. *Id.*

217. This section is an edited and shortened version of a report submitted by John Armentano of Mineola, New York.

218. 13 URB. LAW 723, 761 (1981).

219. 436 U.S. 658 (1978).

220. 445 U.S. 662 (1980).

221. 448 U.S. 1 (1980).

222. 643 F.2d 1188 (5th Cir. 1981), *reh'g denied*, 649 F.2d 336 (5th Cir. 1981) *cert. denied* \_\_\_\_\_ U.S. \_\_\_\_\_, 102 S. Ct. 1251 (1982).



case to have been decided in this area. A landowner instituted a civil rights action against the city and its mayor alleging that the city, through its zoning ordinance and in its failure to rezone his land, had deprived him of property without due process and without just compensation. The court of appeals held that the mayor, in vetoing the ordinance passed by the city's legislative body, was performing a legislative function and was thus entitled to absolute immunity from civil suit. However, the city itself was not entitled to legislative immunity from damages in connection with its zoning regulation.

This case reviews the entire area of civil rights litigation. It also discusses the application of *Agins v. City of Tiburon*,<sup>223</sup> *Penn Central Transportation Co. v. City of New York*.<sup>224</sup> Most critically, the court sets forth very clearly that in an action under section 1983, money damages will lie in favor of any person whose property is taken for public use without just compensation by a municipality through a zoning regulation that denies the owner any economically viable use thereof. The measure of damages in such a case comes from *San Diego Gas and Electric*:<sup>225</sup> an amount equal to the just compensation for the value of the property during the period of the taking. The court stated that the municipality would be liable in damages from the time that the owner notified the municipality's governing body that a taking of its property had occurred because of the zoning classification until it was corrected. This, needless to say, is a major development in the law of zoning and will most likely result in many applications and letters to municipalities that the zoning is confiscatory or otherwise illegal and, then after trial, if the plaintiff is correct, an appropriate money judgment will be awarded in addition to the declarative relief.

*Creative Environments, Inc. v. Eastbrook*<sup>226</sup> is an example of an unsuccessful case which nonetheless sets out applicable section 1983 criteria. There, a suit by a developer against municipal officials and others was filed claiming that civil rights were violated in connection with the rejection of the developer's subdivision plan which employed a cluster concept. Although the court dismissed the complaint, it did reinforce the holding in *Kadar Corp. v. Millbury*,<sup>227</sup> that a complaint under Section 1983 which alleges facts

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223. 447 U.S. 255 (1980).

224. 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977); 438 U.S. 104 (1978).

225. *San Diego Gas & Elec., Co. v. City of San Diego*, 450 U.S. 621 (1981).

226. 491 F. Supp. 547 (D. Mass. 1980).

227. 549 F.2d 230 (1st Cir. 1977).

to support the essential claim of purposeful discrimination or knowing or reckless or willful conduct equivalent to purposeful discrimination states a cause of action under Section 1983. The action in *Creative Environments, Inc.* failed for a lack of proof on this essential point.<sup>228</sup>

*Heritage Farms, Inc. v. Solebury Township*<sup>229</sup> is a good example of the application of the abstention doctrine. There, owners and developers of residential developments within the township complained that the defendant municipality had embarked upon a course of conduct to impede and delay plaintiff's development projects. The court held that it would abstain from deciding the matter until the conclusion of certain state proceedings, which were in progress, at which time the plaintiff would be permitted to return to the federal courts. Although a cause of action had been stated, the court abstained in reliance upon *Railroad Commission of Texas v. Pullman*.<sup>230</sup> The court recognized that it would preserve the availability of federal forum for vindication of federal rights. However, it felt that it should abstain because the entire matter might be determined on state grounds. The court specifically noted that it would not apply the doctrine of abstention in a blanket manner in land use cases because that would foreclose the option of pursuing federal constitutional claims in the land use area under section 1983. It is very significant to note that the court was ready to review those claims if the state action hadn't been already pending.<sup>231</sup>

Less typical is *Archer Gardens v. Brooklyn Center Development, Corp.*,<sup>232</sup> in which the plaintiffs who were owners of property in an urban renewal area instituted an action under section 1983 against the city and a private developer as well as a sponsor of an urban renewal project for conspiracy and misuse of condemnation power

228. See also *Daubner v. Harris*, 514 F. Supp. 856 (S.D.N.Y. 1981) (subsidized public housing); *Marty's Adult World of New Britain, Inc. v. Guida*, 453 F. Supp. 810 (D. Conn. 1978) ("health" club); *Aristocrat Health Club of Hartford v. Chaucer*, 451 F. Supp. 210 (D. Conn. 1978) (massage parlor); *T & M Homes, Inc. v. Township of Mansfield*, 162 N.J. Super. 497, 393 A.2d 613 (1978); *Couf v. Baker*, 652 F.2d 585 (5th Cir. 1981) (Condo project); *Bossier City Medical Suite, Inc. v. City of Bossier*, 483 F. Supp. 633 (W.D. La. 1980) (certificate of occupancy); *Cowart v. Ocala*, 478 F. Supp. 774 (M.D. Fla. 1979) (building permit).

229. 507 F. Supp. 33 (E.D. Pa. 1980).

230. 312 U.S. 496 (1941).

231. See also *Riccobono v. Whitpain Township*, 497 F. Supp. 1364 (E.D. Pa. 1980).

232. 468 F. Supp. 609 (S.D.N.Y. 1979).

so as to deprive plaintiffs of their property without just compensation. The plaintiffs claimed that the municipality, by threatening condemnation of their property, created a situation in which the plaintiffs were unable to generate income from the property. The result was that plaintiff could not pay the real estate tax on the property which would then be sold at a much reduced price at a tax sale. The court held that a cause of action was stated and the plaintiffs did not have to exhaust their administrative or state remedies, in the foreclosure action.

More typical is *Gorman Towers, Inc. v. Bogoslavsky*.<sup>233</sup> The court of appeals held that a developer and architect who brought an action against various public officials who opposed a certain high rise apartment complex by enacting an unconstitutional amendment to the city's zoning ordinance, violated plaintiff's civil rights. The case is essentially one in which the allegations were made that the city's zoning was done without a rational basis and therefore deprived appellants of their property without due process and in violation of their right of equal protection of the laws under the fourteenth amendment. Accordingly, the court held a cause of action was stated under Section 1983. The plaintiffs also predicated civil rights liability upon an alleged conspiracy to have the city not issue a building permit. The court held that this too stated a cause of action under 42 U.S.C. § 1983.

## **XII. Vested Rights and Developers' Agreements:<sup>234</sup> A Brief Note**

While many courts continue to wrestle with the vested rights concept<sup>235</sup> (at what point does a landowner have a right to proceed

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233. 626 F.2d 607 (8th Cir. 1980).

234. I am indebted to John Taylor of McDonough, Holland & Allen in Sacramento, California, for putting together recent cases in this area.

235. 2 N. WILLIAMS, *supra* note 173, § 5602; 4 *id* § 104.02; *see also* Hagman, *The Taking Issue: The HFH et al. Round*, 28 LAND USE L. & ZONING DIG. 5 (1976); McCown-Hawkes & King, *Vested Rights to Develop Land: California's Avco Decision and Legislative Responses*, 6 ECOLOGY L. Q. 755 (1978). California was the leader in this area. *See, e.g.*, *Avco Community Devs. v. South Coast Regional Comm'n*, 17 Cal. 3d 785, 533 P.2d 546, 132 Cal. Rptr. 386 (1976), *cert. denied*, 429 U.S. 1083 (1977); *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975).

Also, Hawaii is in the midst of defining the area. *See* Devens, *Overview Remarks*, in VESTED RIGHTS, DEVELOPMENT RIGHTS 9 (Proceedings of June 22, 1979 Conference on Planning for Growth Management, Honolulu, Hawaii); *Life of the Land, Inc. v. City Council*, No. 7240 (Hawaii Sup. Ct. Jan. 11, 1980); *Life*

with a building project despite a new law that makes such a project illegal),<sup>236</sup> it appears that in California, at least, the emphasis may be shifting to negotiated agreements between developer and local government.<sup>237</sup> Several cases from several jurisdictions continue with the increasingly established view that without a valid permit together with action in reliance thereon, it is difficult to make a case for the right to proceed in the face of a prohibitory new ordinance.<sup>238</sup> However, a mistake by an administrator, discovered much later and upon which an owner relies to his detriment, has been recently held to result in a vested right,<sup>239</sup> as has a sudden change by the local authorities seemingly occasioned by a landowner's particular development.<sup>240</sup>

In response to the difficulties in obtaining all the necessary permits needed to commence development in sufficient time to avoid changes in various permitting ordinances, landowners in several jurisdictions look increasingly to some sort of agreement between themselves and local government for guarantees concerning the land use regulatory framework within which they must develop. Particularly applicable to multi-state developments, such agreements often cover not only zoning and subdivision, but also infrastructure fees and utility service guarantees. Such agreements are common in California and Illinois (where they have the benefit of statutory authorization) and in some other jurisdictions as well. As appears below, they are also increasingly popular abroad.

### XIII. Pertinent Foreign Land Use Experience

Many of our more innovative land use management techniques are modifications—if not copies—of what has taken place outside the United States. Also, increasingly parallel approaches to similar problems arise. This appears particularly true in four areas:

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of the Land, Inc. v. City Council, 60 Hawaii 446, 592 P.2d 26 (1979); Allen v. City & County of Honolulu, 58 Hawaii 432, 571 P.2d 328 (1977); Denning v. County of Maui, 52 Hawaii 653, 485 P.2d 1048 (1971); Dalton v. City & County of Honolulu, 51 Hawaii 400, 462 P.2d 199 (1969).

236. See Callies, *Land Use: Herein of Vested Rights, Plans, and the Relationship of Planning and Controls*, 2 U. HAWAII L. REV. 167 (1979).

237. Holliman, *Development Agreements and Vested Rights in California*, 13 URB. LAW. 44 (1981); Hagman, *Development Agreements* (2 parts), 3 ZONING & PLANNING L. REP. 65-71 and 73-78 (1980).

238. Arkae Dev., Inc. v. Zoning Bd. of Adjustment of City of Ames, 312 N.W.2d 574 (1981); O'Donnell v. Bassler, 289 Md. 554, 425 A.2d 1003 (1981).

239. Three Rivers Youth v. Zoning Bd. of Adjustment, 437 A.2d 1064 (1981).

240. May Dep't Stores Co. v. County of St. Louis, 607 S.W.2d 857 (1980); Hanley v. State College Zoning Bd., 430 A.2d 1236 (Pa. 1981).

development agreements, special courts, urban redevelopment, and the relationship of plans to laws.

### A. *Development Agreements*

As noted in section XII above, the issue of development agreements is of emerging importance in United States land management law. A similar agreement is part of England's venerable Town and County Planning Laws.<sup>241</sup> The pertinent section reads as follows:

52. (1) A local planning authority may enter into an agreement with any person interested in land in their area for the purpose of restricting or regulating the development or use of the land, either permanently or during such period as may be prescribed by the agreement; and any such agreement may contain such incidental and consequential provisions (including provisions of a financial character) as appear to the local planning authority to be necessary or expedient for the purposes of the agreement.
- (2) An agreement made under this section with any person interested in land may be enforced by the local planning authority against persons deriving title under that person in respect of that land, as if the local planning authority were possessed of adjacent land and as if the agreement had been expressed to be made for the benefit of such land.
- (3) Nothing in this section or in any agreement made thereunder shall be construed—
  - (a) as restricting the exercise, in relation to land which is the subject of any such agreement, of any powers exercisable by any Minister or authority under this Act so long as those powers are exercised in accordance with the provisions of the development plan, or in accordance with any directions which may have been given by the Secretary of State as to the provisions to be included in such a plan; or
  - (b) as requiring the exercise of any such powers otherwise than as mentioned in paragraph (a) of this subsection.
- (4) The power of a local planning authority to make agreements under this section may be exercised also—
  - (a) in relation to land in a county district, by the council of that district;
  - (b) in relation to land in the area of a joint planning board, by the council of the county or county borough in which the land is situated,

and references in this section to a local planning authority shall be construed accordingly.<sup>242</sup>

Much the same occurred in parts of Canada<sup>243</sup> for purposes of governing zoning and subdivision exactions—with mixed results.<sup>244</sup>

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241. Town and County Planning Act, 1971.

242. *Id.* at § 52.

243. *See infra* note 252.

244. *See* M. Howard Thomas, *Municipal Land Use Control in British Columbia*, 14 URB. LAW 847 (1982).

### B. *Special Courts*

Experience of land use lawyers with general court treatment of critical issues has from time to time generated sentiments ranging from annoyance to outrage. A popular solution is the creation of specialized courts to deal with such problems. Such a court exists in the Australian State of New South Wales: the Land and Environment Court. It is a branch of the state supreme court, and its jurisdiction is exclusive.<sup>245</sup> The Land and Environment Court hears appeals only after the New South Wales planning law machinery has worked through the local level.<sup>246</sup>

#### 1. THE LEGAL CONTEXT<sup>247</sup>

Environmental planning control in New South Wales is effected by means of an environmental planning instrument which permits (either with or without the need for consent) or prohibits the development of land. Legislation makes provisions for three types of plans: (1) state, (2) regional, and (3) local. Local councils are empowered to prepare "development control" plans. Such a plan does not have the status of a local environmental plan but its contents must be taken into account by the relevant cogent authority when determining a development application. Except in the case of state environmental planning policies, environmental studies must be carried out before the making of any environmental plan. The environmental planning instrument can declare any class or description of development to be "designated" development, which triggers a requirement that an application for such development be accompanied by an environmental impact statement.

The development application must be made to the consent authority, which is usually the local council. The state minister of the Department of Environment and Planning may intervene if a development application may have a significant effect on state and regional planning.

An applicant who is dissatisfied with the determination of the consent authority may then appeal to the Land and Environment Court. In the case of "designated" development, a member of the public who objects to the development may also file an appeal.

245. I am much indebted to Justice Jerrold Cripps of the New South Wales Land and Environment Court whose detailed written explanation of the court and its workings forms the basis for this section.

246. See A. FOGG, *AUSTRALIAN TOWN PLANNING LAW UNIFORMITY AND CHANGE* (1974); D. FISHER, *ENVIRONMENTAL LAW IN AUSTRALIA* (1980).

247. *Id.*

## 2. THE SPECIAL COURT'S JURISDICTION

The Land and Environment Court is a specialist court exercising comprehensive jurisdiction in environment planning and assessment and related matters. It also has extensive jurisdiction relating to the compulsory acquisition of land and the payment of compensation. It was intended that the court combine the characteristics of a superior court with that of an expert administrative tribunal.

Prior to the creation of the Land and Environment Court, appeals were generally heard by an expert administrative tribunal and questions of law were determined by the state supreme court. Now, the Land and Environment Court has exclusive jurisdiction to determine these matters.

The jurisdiction of the court is divided into five classes: (1) appeals brought against decisions of the consent authorities; (2) decisions, *inter alia*, of local councils refusing building permissions; (3) compensation proceedings with respect to land condemned by statutory bodies; (4) civil (private) enforcement of environmental laws; and (5) government (public) enforcement of environmental laws.

The court has very wide powers of appeal on class 1 through class 3 cases (except in those cases where the minister has intervened and directed that a development application should be removed from the local council because of state and regional significance). These include the power to hear new evidence, and to do anything a local government might have done by way of granting relief. The decision of the court in all these cases is final except for questions of law which may be taken to the Court of Appeals.

In class 4 cases, the court has the same jurisdiction as the Supreme Court previously had to hear and dispose of any proceedings concerning planning and environmental law. The court has exclusive jurisdiction in this field and only the judge of the court may preside using the usual rules of evidence. The court has no appellate jurisdiction with respect to decisions made in plan making process, but has appellate jurisdiction with respect to some decisions made in the process of environmental impact assessment. However, in all cases the court has exclusive jurisdiction for the judicial review of the exercise of functions conferred upon persons responsible for the plan making and environmental impact assessment.

### 3. THE USE OF ADMINISTRATORS TO DECIDE APPEALS

Much of the work of the court is handled by "assessors"—of which there are nine—who have certain town and environmental planning qualifications. These assessors are an important part of the court since they can handle (either alone or with a judge) cases falling in classes 1 to 3 (above). (Matters coming before the court in classes 4 or 5 may only be determined by a judge.) In class 1 and 2 cases the assessors hold preliminary hearings and if a decision is reached during the hearings, it is a binding decision of the court. If no agreement is reached, the assessor reports to the court setting out the facts and his views as to what are the issues in dispute between the parties. In the hearings, the assessor exercises jurisdiction of the court subject to certain qualifications. Questions of law that arise in the hearings are referred to the judge for a ruling. The assessors also have a role in certain valuation and compensation proceedings. In class 1 to 3 cases, they often assist the judges in the proceedings.

### 4. RELAXATION OF THE RULES OF EVIDENCE

In class 1 to 3 cases, proceedings are conducted as expediently as possible. The court is not bound by rules of evidence and it may obtain assistance from professionals in deciding an issue.

Traditional technical rules of evidence have been deliberately excluded. Courts in Australia have been reluctant to alter the system under which the courts have operated. Whenever such changes have been included in legislation, they have often been ignored by the courts. The Land and Environment Court, to the contrary, expressed a hope that a more generous interpretation be given to that section for the following reasons: (1) Environmental cases have far-reaching effects but it is not uncommon for local councils not to provide any evidence on appeal because of the local elected official's unwillingness to take responsibility for hindering development. Application of strict rules of evidence in such cases would deny the court relevant and important information. (2) Assessors who are selected to preside over certain cases are not trained lawyers but have qualifications in other disciplines and strict application of the rules of evidence would be an undue burden.

### *C. Urban Redevelopment and Enterprise Zones*

The United Kingdom experience with urban development corporations and enterprise zones as methods for attracting new private business into economically and physically deteriorated



areas is of considerable importance to the United States, which has experimented with Urban Development Corporations (UDCs) and is now considering its own enterprise zone program.<sup>248</sup>

The United Kingdom's planning policies after 1945 have been aimed at preventing urban sprawl by establishing green belt corridors and by dispersing the population and industry away from major cities through the establishment of new towns. The result of these planning policies has been that war-damaged urban centers have never been fully rebuilt, which has contributed to their present decay.

Recent studies have shown inner cities as compared to outlying areas have a higher unemployment rate and a proportionately higher number of semi-skilled and unskilled workers. Many firms, especially small businesses, have closed and the traditional industries such as manufacturing, docks, and transport have reduced their work force. New service industries and office jobs that have been developed in the inner cities have not reduced the unemployment rate of unskilled workers. The Labour Party's approach to the urban problem was embodied in the Inner Urban Areas Act of 1978 under which seven inner city authorities were designated as "partnership" authorities. Cooperation between local government authorities at district and county council level with central, regional and other government agencies was an essential element of the scheme, and the local authorities were given grants and enhanced powers to assist industry. The "partnership" schemes were not a success perhaps because of widespread ignorance of the "inner city policy" and bureaucratic red tape.<sup>249</sup>

In the view of the Conservative Party that took office in May 1979 there was a need to reemphasize the role of the private sector. To put this into effect two new measures were proposed: urban development corporations and enterprise zones.

#### 1. THE URBAN DEVELOPMENT CORPORATION

While UDCs have had a decidedly mixed response and history in the United States, they appear to be a major part of the Conservative government's urban policy, with UDCs established for, *inter*

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248. See, *supra* notes 7-41, and text accompanying.

249. Loughlin, *Local Gov't, Planning and Land Act: Local Government in the Welfare Corporate State*, 44 MODERN L. REV. 422, 439 (1981); DEP'T OF THE ENVIRONMENT, POLICY FOR THE INNER CITIES, 6845 (1977); A. McINTOSH & V. KEDDIE, STUDY FOR THE DEP'T OF THE ENVIRONMENT INNER CITIES DIRECTORATE, in THE INNER CITY, at 4 (August 1979) (cited in Research Doc. Guide No. 3, Greater London Council, May 1980); Cox, *Continuity and Discontinuity in Conservative Urban Policy*, 3 URB. L. & POL'Y 269, 286-87 (1980).

*alia*, Merseyside (Liverpool) and Isle of Dogs (London Docklands). This is not a particularly new departure from what has become more or less standard United Kingdom practice with respect to public-sector controlled development. Both new town corporations and, to a lesser extent, town redevelopment agencies closely control development by means of appointed boards under the loose direction of the central government during the past forty years, both on relatively undeveloped (i.e., Cumbernauld, Milton Keynes) and developed (i.e., Peterborough) sites.<sup>250</sup>

The UDC in the United Kingdom consists of a land assembly and development corporation which has parliamentary authority to manage what it develops. In most instances, it both *acquires* land (both by bargain and sale and by "compulsory purchase" or eminent domain), and may control the use of land within its jurisdiction provided that power is specifically granted by the secretary of state for the environment. Broadly speaking, the UDC may do all that a local government may do, provided the secretary so provides by order. The purpose of the UDC is to "regenerate" an urban development area, which may be either a metropolitan district or (in whole or in part) an "inner" London borough.<sup>251</sup>

The Merseyside Development Corporation (MDC) is a good example of how the UDC is proposed to work. In late 1981 the MDC published a proposed development strategy<sup>252</sup> outlining both its proposed framework for public-private development and its guide for controlling development. It is an initial blueprint for redevelopment of the over 800 acres in its jurisdiction. Of that total, over 90 percent is already publicly owned (primarily by British Rail and Mersey Docks & Harbour Co.). While upwards of 250 firms do business in the area, only about two dozen are of any size. All the property is along the Mersey River or its estuary; 20 percent is dockland.<sup>253</sup>

While it is not easy (or accurate) to generalize (there are roughly four development areas upon which MDC proposes to concentrate) nevertheless the following broad categories of activities are proposed:

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250. See, e.g., Callies, *Positive Planning in England*, 4 ASPO LAND USE CONTROLS Q. 12 (1970).

251. Local Government, Planning and Land Act, 1980, §§ 135-71. The order is reviewable by Parliament. For a full description, see V. MOORE & L. CATCHPOLE, *THE LOCAL GOVERNMENT, PLANNING AND LAND ACT* (1981).

252. Initial Development Strategy, Merseyside Development Corporation (August 1981) at 2.

253. *Id.*, at 5-11.

- (1) Land acquisition in aid of development.
- (2) Providing of, or improving, highway access, sewage treatment and other infrastructure improvements to proposed commercial industrial and residential development areas.
- (3) Creation of additional residential development.
- (4) Creation of additional recreational and open space land uses.
- (5) Improve, dredge, etc., disused or underused docks.<sup>254</sup>

Certainly the most potentially spectacular urban redevelopment by a UDC is the London Docklands Development Corporation (LDDC). The Docklands' decline date at least from the 1960s, when the closing of its docks commenced; the last shut down in 1981. The principal needs appear to be infrastructure to lure businesses which are the key to redevelopment. As the UDCs urban development area boundaries stretch nearly to the city, it could be immensely successful. One of the major problems is transportation, and everything from roadway transport to a new underground link (the latter at exorbitant cost) has been proposed. There is already a major new hotel on the banks of the Thames (virtually the only one in the area) and plans for major commercial (hypermarket) industrial and low-cost housing schemes are either in the works or commenced. The location of an enterprise zone at the Isle of Dogs is seen to be an advantage (it is the only one which is being managed by other than the local government in whose jurisdiction it is placed). So far, eminent domain powers of the UDC have been used sparingly. A large percentage of the land in the urban development area is already publicly-owned.<sup>255</sup>

This double dose of public redevelopment power/administration—UDC and EZ—at the London Docklands' site is well worth watching. The incentives offered, the public controls granted (and the glare of publicity) together with the vast size and potential of the area provide a unique laboratory to test the various strategies for developing housing, tourism commerce and industry all at the same waterfront, inner-city site.

## 2. ENTERPRISE ZONES<sup>256</sup>

Enterprise zones represent a different concept from urban de-

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254. *Id.* at 7-227.

255. *London Docklands* (Financial Times Survey), Financial Times, March 10, 1982, at 35-38; *The London Urban Development Corporation*, LAW SOC. GAZETTE, Feb. 4, 1981, at 117-19.

256. This section is adopted from a report submitted by Peter J. Purton, L.M.R.T.T.P.I., of Norton, Rose, Botterell & Roche, in London, and Clive Douglas, LL.B. (Warwick).

velopment corporations although enterprise zones may be incorporated within an urban development corporation.<sup>257</sup> Significantly, the enterprise zones are to be autonomous and outside, although complimentary to, the existing policy framework for inner urban and regional areas. Any effects enterprise zones have on the existing policy strategies must therefore be closely monitored for the initial ten-year period for their designation and operation.

To be designated an enterprise zone, the Secretary of State of the central government must invite the local government or agency to develop an enterprise zone scheme. The scheme, if developed is subject to public hearings and final acceptance by the central government.<sup>258</sup> If designated an enterprise zone, businesses within the zone will have substantial benefits, as set out in Part I of this article.

a. *The Implications of Enterprise Zones.* Since the enterprise zones are still new, there is little evidence yet of their achievements or whether the hybrid planning and tax controls have benefited one type of area more than another. Thus, in measuring the achievements of the enterprise zones at this early stage what little information there is of their operation must be evaluated against the comments and criticisms made about them before they came into being.

For the purposes of discussion, those comments and criticisms are divided into two broad categories:

- (a) the impact enterprise zones may have on the planning system, and
- (b) the taxation implications.

Bearing in mind the purpose of enterprise zones it is important that the theoretical and actual implications raised by this experiment are considered within the overall context of economic strategy and land policy.

**(1) Implications for the Planning System:** Currently individual development within areas covered by local plans must secure its own planning permission.<sup>259</sup> Planning permission is a local matter involving public hearings. For enterprise zones specified classes of development are automatically deemed to have been granted per-

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257. Local Government, Planning and Land Act, 1980, ch. 65, schedule 32.

258. *Id.*

259. McAuslan, *Local Government and Resource Allocation in England: Changing Ideology, Unchanging Law*, 4 URB. L. & POL'Y, 215, 250 (1981).

mission. By having a general perimeter definition of what constitutes permissible development, any proposal that conforms to it will by-pass the protective mechanisms covering individuals likely to be affected by the proposal. An aggrieved person has no opportunity to air his objections at a public inquiry, nor will an appeal to his local planning authority be sustained.

Objections can be made to the council or corporation when they have prepared a scheme for an enterprise zone and a "person aggrieved" can challenge the validity of the secretary of state's designation order within six weeks of it being made.<sup>260</sup> However, once these opportunities have passed, individuals have no chance to object to a development that meets the general criteria outline in the scheme. Absence of an appeal procedure deprives interested persons of an opportunity to make representations about a proposal at a public local inquiry unless the proposal is outside the class of development specified in the scheme.

The importance of establishing a suitable balance of acceptable development in the enterprise zone scheme is great. For instance, to allay fears that large scale retail outlets would flood into zones disrupting balanced development, upper limits for floor space for retail outlets, without special permission, have been set for most enterprise zones.<sup>261</sup>

Before the details of the enterprise zones were known, there was fear that the relaxation of the planning control apparatus would result in a diminution of controls over pollution, safety, health and such issues. Such controls, as predicted, are still intact in enterprise zones.<sup>262</sup> One critic has said unless safety regulations are streamlined, there would be little incentive for small businesses to transfer or start-up.<sup>263</sup> However, present information does not support this theory, and initial indications from Swansea and Speke enterprise zones show much interest in small units of 500 square feet.<sup>264</sup> But it also appears that similar sized "nursery" units outside the zones are in great demand.<sup>265</sup>

Building regulations are primarily concerned with the stability

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260. See *supra* note 257.

261. Financial Times, Sept. 8, 1981, at 11, col. 1.

262. ROYAL TOWN PLANNING INSTITUTE, PLANNING FREE ZONES: A POLICY STATEMENT, § 4.1 (Nov. 1979).

263. Parl. Debate, H.C., 1502 (June 4, 1980); Purton & Douglas, *Enterprise Zones in the United Kingdom: A Successful Experiment?*, 1982 J.P.L. 409, 418, n. 26.

264. The London Times, Oct. 5, 1981, at 21.

265. *Id.*

of materials rather than their appearance. Since layout and design are planning matters, if planning permission were not required, a developer may be able to use cheaper and less attractive materials which might otherwise not be approved by the planning authorities because of their poor appearance or weathering qualities.<sup>266</sup> Furthermore, there would be no incentive for the developer to consider matters such as landscaping.

It will be a few years before experience demonstrates whether these fears are groundless or not. To ensure desirable results, careful attention must be paid in the drafting of the schemes to the constraints to be imposed. Perversely, tight constraints would undermine the basic concept of existing zones; thus a balance must be found and held.

(2) **Tax Implications.** The taxation implications of enterprise zones are formidable. Perhaps the most important provision is that which exempts industrial and commercial buildings from rates—the ad valorem real property tax. Since local authorities receive 100 percent compensation from the treasury for all rates lost, the treasury must in turn recover this money through general taxation. Initial costs have been estimated between £5 million (\$8 million) and £10 million (\$16 million) a year, although this could increase to £50 million (\$80 million) in due course.<sup>267</sup> While the enterprise zones are new, this shift in taxation is negligible. However, if significantly more zones are created, the effect could be marked.

Businesses showing a profit could benefit from capital allowances available to them. Start-up firms will probably not be able to take advantage of this provision since they may not show a profit for the first few years. However, since the capital allowances may possibly be used against tax liabilities in other areas, an owner with such tax liabilities may acquire land in an enterprise zone to offset those liabilities.

Together, the rates and capital allowance provisions clearly make it advantageous to own or develop industrial or commercial property in an enterprise zone. The positioning of a zone's boundary line is therefore of great importance and political maneuvering to influence the selection of the boundaries was not unexpected.<sup>268</sup> There has been some evidence that firms have been led to believe

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266. ROYAL TOWN PLANNING INSTITUTE, *supra* note 262 at ¶ 4.3.

267. Parl. Debate, H.C., 1171 (May 15, 1980) (Standing Comm. D., statement of the Minister for Local Government & Environmental Services); Purton & Douglas, *supra* note 263 at 419 n. 29.

268. See *supra* note 263 at col. 1440.

certain areas would be included in the enterprise zone. For example, a large supermarket had applied for permission to erect an 80,000 square foot superstore in the proposed Isle of Dogs enterprise zone.<sup>269</sup> Having obtained permission, the boundaries of the zone as determined left the site outside the zone. The financial benefit thus lost could make a difference of an estimated two or three percent on turnover.<sup>270</sup>

As expected, the tax provisions have increased the value of land within the enterprise zones. For instance, land within the Dudley enterprise zone is twice as expensive as land outside the zone<sup>271</sup> and large rent increases have been reported in the Swansea and Newcastle/Gateshead zones.<sup>272</sup> Such rent increases are apparently depressing land values on the periphery of the zones.<sup>273</sup>

The elimination of development land taxes (capital gains taxes) on land sold within ten years may further increase the price of land within the zones, especially during the first few years when gains to owners will be the greatest. It is hoped the market forces will operate to lower land values, but it is too early to predict if this will happen. There is concern that only large firms willing and able to pay high rents will be attracted to the zones if rent prices do not come down.<sup>274</sup>

It is yet unknown how the enterprise zones will affect neighboring areas. It may undermine the hope for a reasonable spread of development within an area with an enterprise zone. Enterprise zones may also adversely affect other equally disadvantaged non-zone areas with the problem it sought to cure being moved to such nonzone areas. Opponents of the Salford/Trafford enterprise zones claim zone designation has merely reshuffled existing businesses and jobs in the area without creating new ones. They claim 80 percent of the businesses moving into the zones have come from a five mile radius.<sup>275</sup> Similarly, in Swansea 25 of 32 new firms have moved from within the city.<sup>276</sup>

It is likely that businesses without heavy capital plant or equipment, such as businesses associated with transport, will transfer to

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269. Financial Times, *supra* note 261 at 12, col. 8; 412 Plan. 5 (Apr. 3, 1981).

270. Planning No. 412 at 5 (1981).

271. Estate Times Review, Dec. 18, 1981, at 6.

272. *Id.* at 8, 10.

273. See *supra* note 264.

274. See *supra* note 271.

275. See *supra* note 264.

276. DEP'T OF THE ENVIRONMENT, ENTERPRISE ZONE: PROJECT REVIEW (Jan. 25, 1982).

the enterprise zones. Although historically manufacturing industries have provided more jobs than other industries, this is no longer true.<sup>277</sup> Thus, zone incentives are not geared to attract traditional manufacturing industries and appear to be concentrating on encouraging service industries and light manufacturing industries such as electronics.<sup>278</sup>

For new firms or those moving from a considerable distance there may be a problem of availability of skilled labor. Residents near or within the enterprise zone will probably need to be trained unless the enterprise zone is located in an area which until recently had thriving skilled industries.<sup>279</sup> If skilled labor is not available there may be a problem of firms poaching from areas outside the zone.

b. *Conclusion.* If the interest they have created is any guide, the United Kingdom enterprise zones will have no difficulty attracting a sufficient number of firms. Whether those businesses can act as a spur to the national economy and help to bring about a restoration of their surrounding areas is harder to predict.

Relaxed planning procedures may prevent objections from being raised without significantly reducing administrative delays in view of the health and safety regulations that must be met. Further, by specifying classes of development which do not need individual planning permission, the local planning authority may lose its power to bargain with developers for infrastructure development.<sup>280</sup> The local authority will bear the burden if private developers do not provide the necessary infrastructure.

Schemes should be carefully developed with input from interested persons, since once the schemes are adopted individuals will be unable to object to their contents. There is a danger that local planning authorities, eager to get zone designation, may rush this important consultation process.

Evaluation of the enterprise zone may also pose a problem. What will be the criteria to determine success of enterprise zone measures? New development and jobs may be a measure of success. But the experiment may cripple local authorities who may need to provide infrastructure and who may not be able to get their

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277. See *supra* note 264.

278. Financial Times, *supra* note 261, at 12, col. 5.

279. Transcript of the Proceeding of the Anglo-American Real Property Institute, 63-64 (Oct. 12, 1981).

280. These agreements are made pursuant to § 52 of the Town and County Planning Act, 1971 and hence known as "§ 52 agreements."



share of revenues from increased property values because the compensation received from the central government may only reflect pre-zone land values.<sup>281</sup>

It is too early to judge whether the enterprise zone program is a success. Perhaps it can only be judged near the end of the ten year period. Ten years is a long time in politics; whether enterprise zones will still exist in their present form in ten years remains to be seen.

#### D. *China and the Plan as Law*<sup>282</sup>

Finally, a word about China and plans that are laws. China is a planners' paradise. There is no gap between plan making and plan implementation. Nor is there any private developer to lure or browbeat into conformance. Once a plan is made, it is the law of the land, and as all significant development is public, what the government plans, it simply does. There is no zoning or subdivision law needed to *implement* the plan.

As the plan goes, so goes the region to which the plan applies. The planning process becomes not the most critical, but *the only* stage of importance in deciding upon the use of land.

The institutional framework for plan *making* is remarkably similar to what most planners say works best. There are essentially three levels of planning: national, regional and urban. The latter occurs at the city/village level (the provinces—roughly analogous to our states—also have authority to plan, but only one has done so). The national and regional plans, while taking precedence over urban plans, are largely economic plans. Therefore, urban city planning, as we know it, takes place at the city and village level.

Each urban plan consists of two parts: a comprehensive, long-range plan (20 years) and a detailed, short-term plan. The comprehensive plan has essentially five components: (1) A natural condition and built environment inventory, including the regional context of the city, and its character (primarily scenic, industrial, etc.); (2) A profile of the population—especially its “skills;” (3) A map of the city or village, divided into “functional zones” for industry, warehouses, transportation facilities, housing, public parks, public buildings, and schools; (4) Infrastructure improvements: water, sewer, power and flood protection; (5) Miscel-

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281. 88 MUNC. J. 448 (April 11, 1980).

282. This section represents materials gathered by the author during a teaching trip to the People's Republic of China in June of 1982.

laneous components such as the protection of historic sites, ancient monuments, revolutionary sites and environmental protection plans.

The detailed plan is immediate in terms of application. It contains such things as setbacks from existing and proposed roads, height, density and style limitations in and around protected areas.

The urban plan is drawn up by a city designing and planning department and reviewed for approval as follows: (1) For the three major cities directly governed by the PRC national government (Beijing, Tianjin and Shanghai), all of which are provincial capitals and cities with a population in excess of one million, and 24 "special" (scenic, historic) cities: by the State Council (of the National People's Congress) upon recommendation of the Ministry of Urban and Rural Construction and Environmental Protection, the Provincial Council, and the local People's Council; (2) For all other cities, the Provincial Council and local People's Council.

Thereafter, the plan is legally binding on all public and private activities, agencies and bodies.